EDITOR'S NOTE

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. 85-899-CSY
atus: GRANTED

Title: Connecticut, Petitioner
v.
William Barrett

cketed:
vember 22, 1985

Court: Supreme Court of Connecticut

Counsel for petitioner: Dewey, Julia DiCocco

Counsel for respondent: Genuario, Robert L.

try	Date	Note	Proceedings and Orders
1	Nov 22 1985	G	Petition for writ of certiorari filed.
2	Jan 22 1986		DISTRIBUTED. February 21, 1986
3	Feb 11 1986	P	Response requested. (Due March 13, 1986 - NONE RECEIVED)
4	Apr 16 1986		REDISTRIBUTED. May 2, 1986
5	Mar 13 1986	X	Brief of respondent William Barrett in opposition filed.
6	Apr 29 1986		IFP motion and affidavit in route.
6	May 5 1986		REDISTRIBUTED. May 15, 1986
9	Mar 13 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
0	May 19 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED.
1	May 19 1986		Petition GRANTED.
			**********
2	Jun 9 1986		Record filed.
4	Jun 12 1986		Order extending time to file brief of petitioner on the merits until July 17, 1986.
5	Jul 2 1986		Joint appendix filed.
5	Jul 11 1986		Order further extending time to file brief of petitioner on the merits until July 24, 1986.
7	Jul 17 1986		Brief amicus curiae of United States filed.
3	Jul 24 1986		Brief amicus curiae of Alaska, et al. filed.
9	Jul 24 1986	G	Motion of National District Attorneys Association for leave to file a brief as amicus curiae filed.
0	Jul 24 1986		Brief of petitioner Connecticut filed.
1	Aug 11 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
2	Aug 25 1986		Brief of respondent William Barrett filed.
3	Sep 12 1986		CIRCULATED.
4	Sep 24 1986		Motion of National District Attorneys Association for leave to file a brief as amicus curiae GRANTED.
5	Sep 24 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
6	Oct 6 1986		SET FOR ARGUMENT. Tuesday, December 9, 1986. (2nd case) (1 hour).
7	Dec 9 1986		ARGUED.

85-899

Supreme Court, U.S.
FILED
NOV 22 1985
JOSEPH F. SPANIOL,
CLERK

No.

In The

Supreme Court Of The United States

NOVEMBER TERM, 1985

STATE OF CONNECTICUT,
Petitioner,

v.

WILLIAM BARRETT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT WITH ATTACHED APPENDIX

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QUESTION PRESENTED

In circumstances where a defendant makes a voluntary oral statement, does his equivocal reference to an attorney amount to an invocation of a right to counsel?

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No.

In The

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NOVEMBER TERM, 1985

STATE OF CONNECTICUT,
Petitioner,

v.

WILLIAM BARRETT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Petitioner respectfully requests a writ of certiorari be issued to review the decision and judgment of the Connecticut Supreme Court, entered on July 30, 1985, which reversed the respondent's conviction. The State of Connecticut's motion to reargue was denied on September 24, 1985.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court, reported at 197 Conn. 50, _____ A.2d _____ (1985), is attached hereto as Appendix A. The Connecticut Supreme Court order denying the State of Connecticut's motion to reargue is attached as Appendix B.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on July 30, 1985. The petitioner's motion to reargue was denied on September 24, 1985. This Court has jurisdiction to review the judgment of the Connecticut Supreme Court by writ of certiorari pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 17.1

Revised Rules of the Supreme Court of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

On December 16, 1982, after a trial by jury, the defendant, William Barrett, was found guilty of sexual assault in the first degree, unlawful restraint in the first degree, and a violation of the state's narcotic drug act, Connecticut General Statutes §§ 53a-70, 53a-95, and 19-481c (Rev. 1982), respectively. He was thereupon sentenced to a total term of confinement of not less than nine nor more than eighteen years.

The sufficiency of the factual basis for the respondent's conviction was not seriously contested. Those facts were articulated in the Connecticut Supreme Court opinion. Appendix A.

The dispositive issue in this case was the admissibility of custodial statements made by the respondent after he had been advised in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). The Connecticut Supreme Court concluded that the following scenario developed:

> . . . The relevant evidence was provided by two police officers who testified at the suppression hearing. Their testimony revealed that, shortly after the defendant's arrival at the Wallingford police station, the police advised him of his *Miranda* rights, and asked him if he would give a statement concerning the assault. The defendant immediately replied that he would not give a written statement without his attorney present, although he was willing to answer questions orally. Without further inquiry, the police proceeded to interrogate him in the absence of counsel and to elicit an incriminating statement from him.
>
> An hour later, having discovered the malfunctioning of a tape recorder used without the defendant's knowledge during the first interrogation, the police conducted a second interrogation. They again

advised the defendant of his *Miranda* rights, and he again stated that he would not give a written statement without an attorney, but would answer questions orally. At the end of this interrogation, a police officer asked the defendant if he would be willing to put the oral statement into writing, and he again refused to do so without an attorney.

Appendix A.

The Connecticut Supreme Court concluded that a right to counsel had been implicated. Consequently, the appellate tribunal rejected the trial court's conclusion that the respondent had freely and intelligently waived his rights both to remain silent and to have assistance of counsel.

REASONS FOR GRANTING THE PETITION

The Question Of Whether An Equivocal Reference To Counsel Constitutes An Invocation Of The Right To Counsel Is A Topical Issue Of Persuasive And Substantial Proportions Which Needs Clarification By This Court.

The central contention of the Petitioner in this action is that the Connecticut Supreme Court unduly expanded the protections accorded criminal defendants under the Fifth Amendment to the United States constitution when it determined that this defendant involuntarily waived his right to assistance of counsel at his interrogation. This result was possible only through use of a prophylactic rule which ignored the circumstances of this case.

The test for voluntariness is not whether there has been literal compliance with the procedure set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). Such is not required. *Accord Michigan v. Tucker*, 417 U.S. 433 (1974). Rather, the test of voluntariness is whether an examination of all the circumstances disclosed that the conduct of law enforcement

officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). Determination of whether there has been a valid waiver of the right against self-incrimination is not mechanical but requires an examination of the totality of circumstances in each case. *North Carolina v. Butler*, 441 U.S. 369, 374 (1978); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The petitioner recognized the need for protection against police badgering. *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980). The petitioner further recognizes that upon an accused's request for counsel, interrogation must cease. *Smith v. Illinois*, _____ U.S. _____, 105 S.Ct. 490, 492 (1984). However, an ambiguous or equivocal request for counsel has never been viewed as an invocation of an accused's Fifth Amendment privilege against self-incrimination. Indeed, this Court has not yet developed a standard "for determining the consequences of such ambiguities." *Smith v. Illinois*, 105 S.Ct. at 493. The petitioner would suggest that a rigid rule requiring all questioning to cease upon the mention of the word "attorney" is both unrealistic and unwarranted. A review of the totality of circumstances is more appropriate. Thus the petitioner would rely upon the test for voluntariness recited *supra*.

Even if this Court were to conclude that the defendant's statements should have been suppressed, it is nevertheless clear that the respondent's conviction should not have been reversed. Admission of statements taken in violation of *Miranda* can be harmless error. That standard is met when improperly admitted evidence "was merely cumulative of other overwhelming and largely uncontroverted evidence before the jury." *Brown v. United States*, 411 U.S. 223, 231 (1973); *see also Parker v. Randolph*, 442 U.S. 62, 70-71 (1979).

In the present case, the central issue was whether the victim consented to sexual intercourse with the defendant. The defendant's statement to the police completely exonerated him

of criminal culpability. This statement was totally consistent with his trial testimony.

The petitioner will not at this point summarize the evidence in support of the respondent's conviction. It is sufficient to note that the respondent never challenged the adequacy of that evidence. Thus the Connecticut Supreme Court erred in refusing to conclude that the admission of the respondent's statement, if error, was harmless beyond any doubt.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

/s/ Michael Dearington

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No.

In The
Supreme Court Of The United States

NOVEMBER TERM, 1985

STATE OF CONNECTICUT,
Petitioner,

v.

WILLIAM BARRETT,
Respondent.

APPENDIX

STATE OF CONNECTICUT *v.* WILLIAM BARRETT (12018)

PETERS, C. J., HEALEY, SHEA, DANNEHY and SANTANIELLO, Js.

Convicted, following a jury trial, of the crimes of sexual assault in the first degree, unlawful restraint in the first degree and possession of less than four ounces of a cannabis-type substance, the defendant appealed. He claimed, inter alia, that the trial court erred in denying his motion to suppress certain oral statements he had made to the Wallingford police during a custodial interrogation. The evidence presented at the suppression hearing indicated that, shortly after the defendant had arrived at the Wallingford police station, he had been advised by the police of his *Miranda* rights and asked whether he would give a statement. He immediately replied that he would not give a written statement without his attorney present, but that he was willing to answer questions orally. Without further inquiry, and in the absence of counsel, the police proceeded to interrogate him and to elicit from him incriminating statements. Because the defendant, by refusing to give a written statement

without his attorney present, had invoked his right to counsel under the fifth and fourteenth amendments to the United States constitution, and because the record clearly established that the police, and not the defendant, had initiated the subsequent interrogations which resulted in the incriminating statements, *held* that the trial court erred in refusing to suppress those statements.

Argued June 4—decision released July 30, 1985

Substitute information charging the defendant with the crimes of sexual assault in the first degree, unlawful restraint in the first degree, assault in the third degree and possession of less than four ounces of a cannabis-type substance, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *McKeever, J.*; verdict and judgment of not guilty of assault in the third degree but guilty of sexual assault in the first degree, unlawful restraint in the first degree and possession of less than four ounces of a cannabis-type substance, from which the defendant appealed to this court. *Error; new trial.*

Robert L. Genuario, for the appellant (defendant).

Julia D. Dewey, assistant state's attorney, with whom, on the brief, were *Arnold Markle,* state's attorney, and *Daniel A. Lyons, Jr.,* assistant state's attorney, for the appellee (state).

PETERS, C. J. The dispositive issue on this appeal is whether the trial court erred in refusing to suppress oral statements made by the defendant during the course of custodial interrogation. The defendant, William Barrett, was convicted, after a trial to the jury, of sexual assault in the first degree, in violation of General Statutes § 53a-70 (a), unlawful restraint in the first degree, in violation of General Statutes § 53a-95 (a), and possession of less than four ounces of a cannabis-type substance, in violation of General Statutes

§ 19-481 (c).[1] Upon entry of judgment, he was sentenced to a total effective term of imprisonment of nine to eighteen years. He appeals from this conviction.

The jury could reasonably have found the following facts. On the evening of October 23, 1980, the victim, a young woman of twenty, was waiting for a bus on a street corner in New Haven. The defendant, William Barrett, accompanied by another man, offered her a ride in his car. Since the victim recognized the defendant as a former neighbor and high school classmate whom she had known for eight years, she accepted his offer. Instead of driving to her sister's house as she had requested, however, the defendant drove to a secluded area in Wallingford, where the two men took turns sexually assaulting her. Upon returning to New Haven following the assault, the victim immediately contacted the police. She reported the details of the

[1] At the time in question, General Statutes § 53a-70 (a) provided: "SEXUAL ASSAULT IN THE FIRST DEGREE: CLASS B FELONY: ONE YEAR NOT SUSPENDABLE. (a) A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person."

At the time in question, General Statutes § 53a-95 (a) provided: "UNLAWFUL RESTRAINT IN THE FIRST DEGREE: CLASS D FELONY. (a) A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose the latter to a substantial risk of physical injury."

At the time in question, General Statutes § 19-481 (c) provided: "PENALTY FOR ILLEGAL POSSESSION. SUBSTITUTION OF MEDICAL TREATMENT FOR CRIMINAL SANCTIONS. . . . (c) Any person who possesses or has under his control any quantity of any controlled substance other than a narcotic substance, or a hallucinogenic substance other than marihuana or who possesses or has under his control less than four ounces of a cannabis-type substance, except as authorized by this chapter, may be fined not more than one thousand dollars, or be imprisoned not more than one year, or be both fined and imprisoned; and for a subsequent offense may be imprisoned not more than five years, or fined not more than three thousand dollars or be both fined and imprisoned."

General Statutes § 19-481 (c) was transferred to § 21a-279 (c) in 1983.

assault and identified the defendant as one of her assailants. He was taken into custody by New Haven police at approximately 11:30 p.m. that same night, and held until Wallingford police transported him to the Wallingford police station early the next morning.

During the trial, the defendant moved to suppress oral statements which he had made shortly after his arrival at the Wallingford police station on the ground that his fifth amendment right to counsel had been violated. Following a suppression hearing, the trial court denied the motion.

The defendant raises three issues on appeal. He claims that the trial court erred: (1) in denying the defendant's motion to suppress his oral statements made to the police during custodial interrogation; (2) in denying his motion to suppress summaries of the interrogation made by two nontestifying police officers; and (3) in refusing to permit cross-examination of the complainant concerning her prior sexual activity with the defendant. We find error on the defendant's first claim, and do not reach the other two claims.[2]

The defendant claims that the oral statements he made to the Wallingford police should have been suppressed because he had invoked his right to counsel under the fifth and fourteenth amendments to the

[2] We do not reach the defendant's second claim because our decision today that the defendant's oral statements are inadmissible for constitutional reasons necessarily makes inadmissible the police summaries of the same statements. We thus have no reason to decide whether they would be inadmissible on independent grounds.

We do not reach the defendant's third claim because, although it presents a question of some significance, it is unclear from the record that the issue was raised properly below. The transcript reflects confusion over which question was before the trial court, and no exception to the court's ruling was entered by the defendant as required by Practice Book § 288. Consequently, since this issue was not "distinctly raised at the trial": Practice Book § 3063; we decline to consider it on appeal.

United States constitution.[3] He maintains that he effectively asserted this right when he expressly refused to give the police a written statement in the absence of counsel. The defendant at trial sought unsuccessfully to have the trial court suppress the testimony of a policeman describing the substance of his oral statements.

Established principles of law govern the permissible role of police during custodial interrogations. *Smith* v. *Illinois*, 469 U.S. , 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984); *Edwards* v. *Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378, reh. denied, 452 U.S. 973, 101 S. Ct. 3128, 69 L. Ed. 2d 984 (1981); *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Once a suspect has invoked his right to counsel, all questioning must cease and may not be resumed in the absence of counsel unless the accused both initiates the discussion; *Edwards* v. *Arizona*, supra, 484–85; and knowingly and intelligently waives the right to counsel which he had previously invoked. *Smith* v. *Illinois*, supra, 493. Our resolution of the defendant's claim, therefore, requires a two-step inquiry. We must determine: (1) whether the defendant had in fact invoked his right to counsel; and (2) if so, whether he subsequently waived it.

In taking the first step of our inquiry, we must focus on the defendant's request for counsel itself and the circumstances leading up to this request. *Smith* v. *Illinois*, supra, 494–95. The relevant evidence was provided by two police officers who testified at the suppression hearing. Their testimony revealed that, shortly after the defendant's arrival at the Wallingford police

[3] The defendant did not bring this claim under article first, § 8 of the Connecticut constitution, nor did he cite any Connecticut cases in support of his position. Consequently, we do not consider any Connecticut constitutional claim in this case.

station, the police advised him of his *Miranda* rights,[4] and asked him if he would give a statement concerning the assault. The defendant immediately replied that he would not give a written statement without his attorney present, although he was willing to answer questions orally. Without further inquiry, the police proceeded to interrogate him in the absence of counsel and to elicit an incriminating statement from him.

An hour later, having discovered the malfunctioning of a tape recorder used without the defendant's knowledge during the first interrogation, the police conducted a second interrogation. They again advised the defendant of his *Miranda* rights, and he again stated that he would not give a written statement without an attorney, but would answer questions orally. At the end of this interrogation, a police officer asked the defendant if he would be willing to put the oral statement into writing, and he again refused to do so without an attorney.[5]

[4] *Miranda* v. *Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), holds that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

[5] During the trial, subsequent to the suppression hearing, a police officer testified that the police had also asked the defendant if he would reduce his oral statement to writing at the end of the first interrogation, and that the defendant had made the same response: that he would put nothing into writing without his attorney.

The trial court, in ruling on the defendant's motion to suppress his oral statements, impliedly found that the defendant had requested counsel.[6] We agree. The record is clear that the defendant had requested counsel not once, but on at least three separate occasions. At no time did the police attempt to determine whether an attorney was coming or, indeed, even whether the defendant had succeeded in contacting one.

The record is also clear that the police understood this request for counsel. The two police officers who brought the defendant back to the interrogation room for the second questioning informed the detective commander that the defendant had refused to give a written statement without his attorney. Reports of the interrogations filed by three participating police officers and later introduced into evidence at the suppression hearing all note the defendant's request to have an attorney present before he put anything into writing. In addition, the defendant made several phone calls in the presence of police.[7] Although the police officers stated that they had no idea to whom the calls were made, one of them admitted that it was his "interpretation" that the defendant had contacted an attorney, and that the attorney was on the way to the station. If the police had been uncertain about the tenor of the defendant's request, they had a duty to clarify his intention rather than proceed to question him. *State* v. *Acquin*, 187 Conn. 647, 672–75, 448 A.2d 163 (1982), cert. denied, 463 U.S. 1229, 103 S. Ct. 3570, 77 L. Ed.

[6] The trial court noted the defendant's refusal to give a written statement without an attorney during its discussion of the defendant's waiver of his rights.

[7] It is unclear from the transcript at precisely what point the phone calls were made. They were definitely made prior to the second interrogation, and a fair reading of the transcript would support a finding that they were made prior to the first interrogation.

2d 1411 (1983); see *Smith* v. *Illinois*, supra, 493.[8] Instead, the record shows that the police made no attempt at clarification. They interrogated the defendant twice within a short period of time in the absence of counsel, and even actively attempted to change his mind about waiting for his attorney before he reduced his oral statements to writing.[9]

The fact that the defendant attached his request for counsel to the making of a written statement does not affect the outcome of this first step of our inquiry. No particular form of words has ever been required to trigger an individual's fifth amendment protections; *Miranda* v. *Arizona*, supra, 444–45; nor have requests for counsel been narrowly construed. See *Edwards* v. *Arizona*, supra, 479, 484-85; *Smith* v. *Illinois*, supra, 491–92. The defendant's refusal to give a written statement without his attorney present was a clear request for the assistance of counsel to protect his rights in his dealings with the police. *Fare* v. *Michael C.*, 442 U.S. 707, 719, 99 S. Ct. 2560, 61 L. Ed 2d 197, reh. denied, 444 U.S. 887, 100 S. Ct. 186, 62 L. Ed. 2d 121 (1979). Such a request continues to be constitutionally effective despite the defendant's willingness to make oral statements. We conclude, therefore, that the defendant did invoke his right to counsel under the fifth and fourteenth amendments.

Having decided that the defendant's statement takes us past the first step of our inquiry, we now must take

[8] In *Smith* v. *Illinois*, 469 U.S. , 105 S. Ct. 490, 493, 83 L. Ed 2d 488 (1984), the United States Supreme Court declined to decide the appropriate procedure to be followed once an ambiguous or equivocal request for counsel has been made. Instead, it referred without comment to different approaches adopted by various jurisdictions, including the approach adopted by this court. *State* v. *Acquin*, 187 Conn. 647, 672–75, 448 A 2d 163 (1982), cert. denied, 463 U.S. 1229, 103 S. Ct. 3557, 77 L. Ed. 2d 1411 (1983); *Smith* v. *Illinois*, supra, 493 n.3.

[9] The police were also aware that the defendant had never been arrested before and was unfamiliar with police procedure.

the second step: whether he subsequently waived the right he had invoked. Once an individual has requested counsel, the burden is on the state to establish that such a waiver has been made. *Miranda* v. *Arizona*, supra, 475; *State* v. *Acquin*, supra, 677. The state must prove that the waiver was not only voluntary, but also constituted a "knowing and intelligent relinquishment or abandonment of a known right or privilege." *Edwards* v. *Arizona*, supra, 482. This burden cannot be met "by showing only that [an accused] responded to further police-initiated custodial interrogation, even if he has been advised of his rights." Id., 484; *Smith* v. *Illinois*, supra, 495.

Because the right to have counsel present during a custodial interrogation is crucial to safeguarding the fifth amendment privilege against self-incrimination; *Fare* v. *Michael C.*, supra, 719; *Miranda* v. *Arizona*, supra, 469; the Supreme Court of the United States has developed a bright-line rule for establishing a waiver of this right. Once an accused has invoked his right to counsel, waiver can be established only by a dual showing: that the accused himself "(a) initiated further discussions with the police, *and* (b) knowingly and intelligently waived the right he had invoked." (Emphasis added.) *Smith* v. *Illinois*, supra, 493. Under this test, there can be no waiver unless the suspect initiates the subsequent encounter with the police. *Solem* v. *Stumes*, 465 U.S. , 104 S. Ct. 1338, 1343, 79 L. Ed. 2d 579 (1984). The second part of the test, the "knowing and intelligent relinquishment" analysis, is not reached absent such initiation. *Smith* v. *Illinois*, supra, 493; *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1044–45, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983) (plurality opinion).

In the present case, the state argues and the trial court found that the defendant's oral statements were properly admitted because, prior to the interrogation,

he had freely and intelligently waived his rights both to remain silent and to have counsel present. The trial court, in denying the defense motion, concluded that the defendant had made the statements "willingly, knowingly and intelligently after an effective knowledgeable waiver of his right to counsel at this point." In making this ruling, the trial court specifically noted that the defendant had been informed of his rights, had indicated that he understood them, had signed a standard rights form, and had willingly agreed to talk with the police. The court found that the defendant's request for counsel before he gave a written statement was evidence that he did in fact understand his rights. His oral statements to the police, then, were held to have been willingly made after an effective waiver of his right to counsel.

The precedent relied upon most heavily by the state in support of this position is *State* v. *Harris*, 188 Conn. 574, 452 A.2d 634 (1982), cert. denied, 460 U.S. 1089, 103 S. Ct. 1785, 76 L. Ed. 2d 354 (1983). At first glance, *Harris* seems to govern the present case. Like the present defendant, the defendant in *Harris* refused to give a written statement to police without counsel but agreed to give an oral statement. That oral statement was later admitted at trial over his objection, and we upheld that ruling. However, the defendant in *Harris* based his claim of error solely on the ground that he had not waived his fifth amendment right to remain silent. He specifically declined to raise the issue of whether his right to counsel under the fifth amendment had also been violated. Id., 577–78 n.4. Accordingly, we did not consider the claim on that ground, basing our decision on an application of the test of waiver articulated in *North Carolina* v. *Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979). The principles that governed our holding in *Harris*, therefore, are not applicable to the present case because, where the right

to counsel is implicated, waiver is governed by the more stringent test enunciated by the United States Supreme Court in *Edwards* v. *Arizona*, supra, and *Smith* v. *Illinois*, supra.

Under this test, a finding that the accused initiated the subsequent "communications, exchanges, or conversations with the police"; *Edwards* v. *Arizona*, supra, 485; is an absolute prerequisite to a finding of waiver. *Solem* v. *Stumes*, supra, 1343. In the present case, the trial court found that the defendant had invoked his right to counsel. The state presented no evidence whatsoever to support a finding that the defendant had initiated the subsequent encounters with police which resulted in his incriminating statements. To the contrary, the evidence clearly established that the police had initiated the interrogations on both occasions. Since the defendant did not initiate the discussions, the trial court's finding of waiver was erroneous and any statements resulting from the interrogations were not admissible against the defendant.

There is error, the judgment is set aside, and a new trial is ordered.

In this opinion the other judges concurred.

NO. 12018

STATE OF CONNECTICUT : SUPREME COURT

V : STATE OF CONNECTICUT

WILLIAM BARRETT : SEPTEMBER 24, 1985

O R D E R

THE MOTION OF THE PLAINTIFF FILED AUGUST 9, 1985 TO REARGUE

HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

FRANCIS J. DRUMM, JR.
CHIEF CLERK

By /s/Carolyn G. Cunha
Assistant Clerk -
Appellate

Notice Sent: 9-24-85
Busek, Kavanewsky & Genuario
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Daniel Lyons, Jr., A.S.A.
Julia Dewey, A.S.A.
Clerk, New Haven J.D.
(CR7-64788)
Hon. Martin McKeever
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OF NEW HAVEN

EDITOR'S NOTE

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No.85-899

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT,
Petitioner,

v.

WILLIAM BARRETT,
Respondent,

BRIEF IN OPPOSITION TO THE STATE OF CONNECTICUT'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

Should the United States Supreme Court review a decision of the Connecticut Supreme Court when it is not in conflict with any decision of any other State Court of last resort or in conflict with any decision of any Federal Court of Appeals nor in conflict with any applicable decisions of the United States Supreme Court?

In ruling that the defendant invoked his right to counsel by refusing to give a written statement without the assistance of an attorney, and in finding that the defendant did not subsequently waive that right did the Connecticut Supreme Court commit Constitutional error?

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The respondent respectfully requests that the writ of certiorari requested by the Office of the State's Attorney of the State of Connecticut reviewing the decision and judgment of the Connecticut Supreme Court entered on July 30, 1985 be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 17.1

Revised Rules of the Supreme Court
of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

a. When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

b. When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

c. When a state or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

The defendant appealed his conviction of Sexual Assault in the First Degree, Unlawful Restraint in the First Degree, and of violation of the State's Narcotic Drug Act, Connecticut General Statute Sections 53a-70, 53a-95 and 19-481c (Rev. 1982) to the Connecticut Supreme Court arguing inter alia that the trial court erred in refusing to suppress oral statements made by the defendant during the course of a custodial interrogation. The opinion of the Connecticut Supreme Court noted the following pertinent facts:

1. The interrogating officers were aware that the defendant had never been arrested previously.

2. The defendant informed the interrogating officers that he did not wish to give a written statement without an attorney.

3. Without further inquiry, the officers proceeded to interrogate the defendant and attempted unsuccessfully to tape-record the conversation of the defendant without the defendant's knowledge.

4. The defendant again stated that he did not wish to give a written statement without an attorney and the officers again interrogated the defendant without any attempt at clarification of that request. The officers again attempted unsuccessfully to tape-record the conversation of the defendant without the defendant's knowledge.

5. The trial court found that the defendant had requested counsel.

6. The police understood this request for counsel.

7. One of the interrogating officers interpreted a phone call by the defendant as being a call to an attorney and further assumed that the attorney was in transit to the police station.

8. The defendant initiated no discussions with the police after requesting counsel and all such subsequent discussions were initiated by the police.

The Connecticut Supreme Court upheld the trial Court's finding that the defendant had invoked his right to counsel but rejected the trial Court finding that the defendant had intelligently and voluntarily waived the right to counsel after this invocation.

The State of Connecticut now petitions this Court to reverse the decision of the Connecticut Supreme Court.

REASON FOR DENYING THE PETITION

Rule 17.1 of the revised rules of the Supreme Court of the United States sets forth the fact that a review on writ of certiorari is not a matter of right, but is one of judicial discretion. It will be granted only for reasons consistent with the character of reasons set forth in Rule 17.1.

It is submitted that the State of Connecticut, in petitioning this Court, has set forth no reasons consistent with Rule 17.1 The petitioner has pointed to no federal court of appeals' decisions or state court of last resort decisions which are in conflict with the Connecticut Supreme Court decision in the case at bar. The petitioner is pointed to no decisions of the United States Supreme Court which are in conflict with the decision of the Connecticut Supreme Court.

Rather, the petitioner argues that the Connecticut Supreme Court has unduly expanded the protections accorded criminal defendants under the Fifth Amendment of the United States Constitution. This is not the case. The decision of the Connecticut Supreme Court is merely the application of the particular factual situation before it to time-honored principals enunciated by this Court.

Reviewing all the facts before it, the Connecticut Supreme Court determined that the defendant invoked his right to counsel by requesting counsel before making a permanent record of his statements and by, in fact, calling counsel with the knowledge of the police. This is certainly consistent with the landmark ruling in Miranda v. Arizona, 384, U.S. 486, 86 S. Ct. 1602, 16 L. Ed. 2d 694:

> "If, however, he indicates in any manner and at any stage of the process, that he wishes to consult with an attorney before speaking, there can be no questioning.

Miranda v. Arizona, supra (emphasis added). See also, Fare v. Michael C., 442 U.S. 707,719,99 S. Ct. 2560, 61 L. Ed. 2d 197, Reh. Denied, 444 U.S. 887, 100 S. Ct. 186, 62 L. Ed. 2d 121 (1979). There is nothing in the record to indicate that the interrogating officers made any attempt to clarify the defendant's request or any attempt to honor the defendant's rights. In fact, the record indicates that the interrogating officers made every attempt to circumvent the rights of the defendant by tape-recording a conversation without the defendant's knowledge, after he clearly indicated he desired not to make a permanent record of his statements without the benefit of counsel and by continuing their interrogation even though they believed that the defendant's attorney was on his way to the station.

Moreover, this Court has held that once a defendant invokes his right to counsel in any manner, there can be no waiver of that right unless the defendant initiates the subsequent encounter with the policy. Solem v. Stumes, 465 U.S. 653 104 S. Ct. 1338, 1343, 79 L. Ed. 2d 579 (1984); Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378, Reh. Denied, 452 U.S. 1973, 101 S. Ct. 3128, 69 L. Ed. 2d 984 (1981).

There is absolutely no evidence in the record to indicate that the defendant initiated the contact with the police officers after he had invoked his right to counsel.

It is submitted that the decision of the Connecticut Supreme Court, rather than being constitutional error, was a laudable one which turned on the unique facts of the case at bar and that the decision of the Connecticut Supreme Court was totally consistent with the applicable principals of Constitutional law set forth by this Court.

CONCLUSION

It is respectfully requested, for all of the reasons stated, that the petition for writ of certiorari be denied.

RESPECTFULLY SUBMITTED

By _____

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No. 85-899

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT,
Petitioner,

v.

WILLIAM BARRETT,
Respondent,

BRIEF IN OPPOSITION TO THE STATE OF CONNECTICUT'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

This is to certify that a copy of the Respondent's Brief and Opposition to the State of Connecticut's Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut was mailed postage pre-paid to Michael Dearington, Esq., Assistant State's Attorney, 235 Church Street, New Haven, Connecticut 06510 on March 12, 1986.

Robert L. Genuario

Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-899

In The
Supreme Court Of The United States

NOVEMBER TERM, 1985

STATE OF CONNECTICUT,
Petitioner,

v.

WILLIAM BARRETT,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

JOINT APPENDIX

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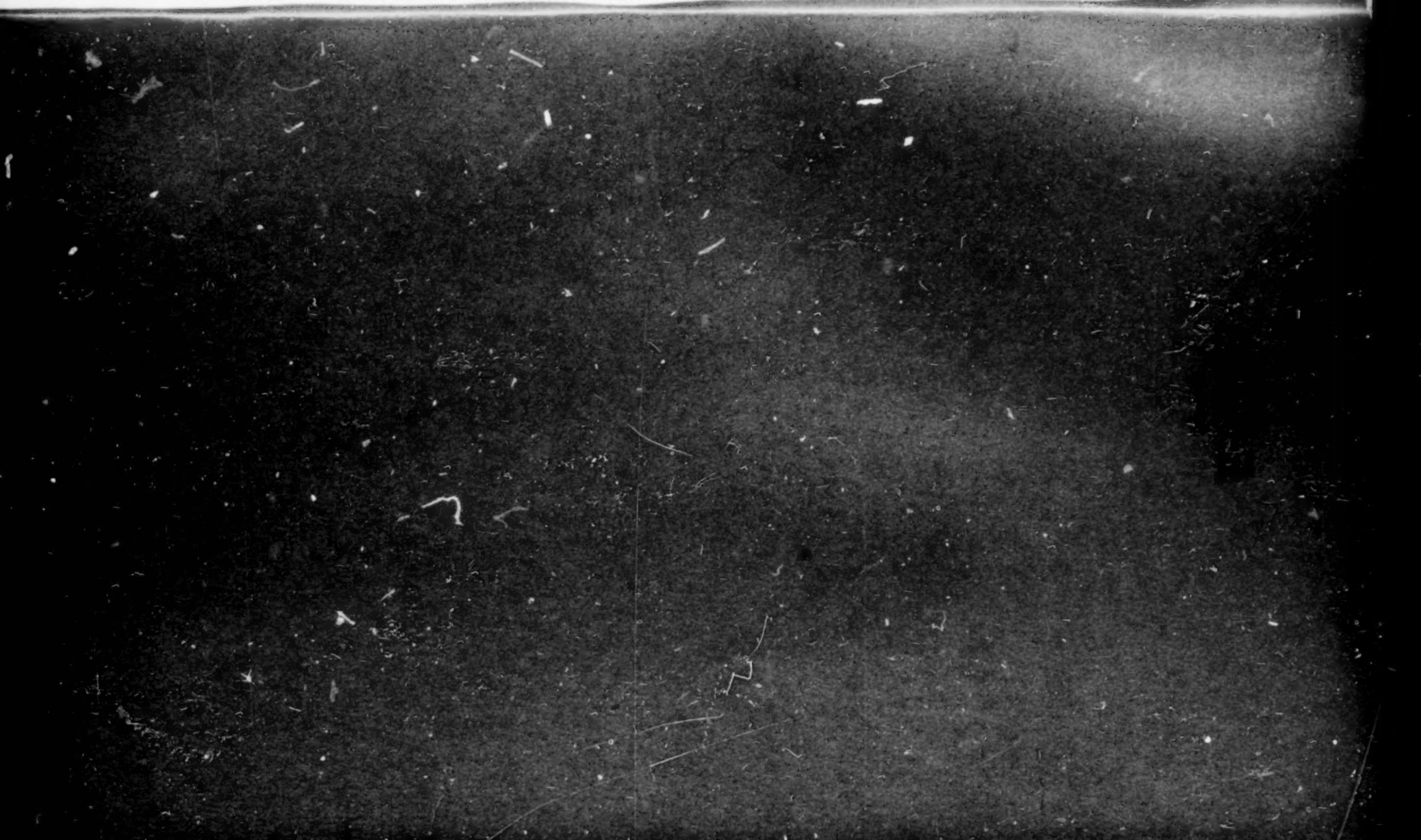
Petition For Certiorari Filed November 22, 1985
Certiorari Granted May 19, 1986

139 pp



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I. SUBSTITUTED INFORMATION DATED DECEMBER 1, 1982

SUBSTITUTE INFORMATION

Daniel A. Lyons, Jr., Asst. State's Attorney for the Judicial District of New Haven accuses William H. Barrett of Sexual Assault in the First Degree and charges that at the Town or City of Wallingford on or about the 23rd day of October 1980, between approximately 7:30 P.M. and 12:00 Midnight, in the area of Tyler Mill Road, the said William H. Barrett did compel another person to engage in sexual intercourse by the use of force against such other person and by the threat of use of force against such other person which reasonably did cause such person to fear physical injury to such person, in violation of Section 53a-70(a) of the General Statutes.

2nd Count

And the Attorney aforesaid further accuses William H. Barrett of Unlawful Restraint in the First Degree and charges that on or about the 23rd day of October, 1980, between the approximate hours of 7:30 P.M. and 12:00 Midnight, commencing in the City of New Haven and continuing to the area of Tyler Mill Road in the Town of Wallingford, the said William H. Barrett did restrain another person under circumstances which did expose the latter to a substantial risk of physical injury, in violation of Section 53a-95(a) of the General Statutes.

3rd Count

And the Attorney aforesaid further accuses William H. Barrett of Assault in the Third Degree and charges that at the Town of Wallingford, on or about the 23rd day of October, 1980, between approximately 7:30 P.M. and 12:00 Midnight, in the area of Tyler Mill Road, the said William H. Barrett, with intent to cause physical injury to another person, namely Mary Ann Jones, did cause such injury to such person, in violation of Section 53a-61(a)(1) of the General Statutes.

4th Count

And the Attorney aforesaid further accuses William H. Barrett of violation of the State Narcotic Drug Act and charges that at the City of New Haven, on or about the 23rd day of October, 1980, the said William H. Barrett did possess or have under his control less than four ounces of a cannabis-type substance, in violation of Section 19-481(c) of the General Statutes.

Daniel A. Lyons, Jr.,
Assistant State's
Attorney

Dated: December 1, 1982.

II. JUDGMENT IN *STATE V. BARRETT*

STATE OF CONNECTICUT

No. CR 7-64788	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
VS.	: OF NEW HAVEN
WILLIAM H. BARRETT	: JANUARY 21, 1983

Present, Hon. Martin L. McKeever, Judge

JUDGMENT

The information of an Assistant State's Attorney, within and for the Judicial District of New Haven charging William B. Barrett with the crimes of Sexual Assault, 1st Degree (3 counts), Kidnapping, 2nd Degree, Assault, 3rd Degree, Threatening, was filed in the Superior Court, Geographical Area 7 in the October, 1980 criminal term of said Court, and thence to October 24, 1980 when said action was transferred to this Court, and thence to November 13, 1980 when the Court (Reynolds, J.) granted the State's Demand for notice of alibi defense and State's Motion for disclosure and inspection both filed October 29, 1980, and when the defendant filed a Motion to reduce bond, which the Court (Reynolds, J.) on said date denied, and when the State made an oral Motion to seal affidavit as to Public, which the Court (Reynolds, J.) granted, and when the defendant appeared before this Court and for plea said Not Guilty to said information and elected to be tried by a jury of six, and thence to December 3, 1980 when the Court (Reynolds, J.) granted per State vs. Acquin the Motion of the defendant filed November 24, 1980 to require notice of uncharged misconduct evidence, and when the Court (Reynolds, J.) granted the Motion of the defendant filed December 2, 1980 for copy of information, and thence to

January 28, 1981 when the State filed its Discovery as ordered by the Court (Reynolds, J.) on December 3, 1980, and thence to January 28, 1981 when the State, with permission of the Court, filed an amended information, as on file, thence to December 1, 1982 when the State's Attorney, with permission of the Court, filed a substituted information charging Sexual Assault, Unlawful Restraint, 1st Degree, Assault, 3rd Degree, and VSNDA 19-481(c), and when the defendant appeared before this Court and for plea said Not Guilty to said information and elected to be tried by a jury of six, and thence to December 9, 1982 when the defendant made an oral Motion to Suppress police statements—reports of Officers Howard, Genovese and Cameron, and thence to December 13, 1982 when the Court (McKeever, J.) denied said Motion as to Officers Howard and Cameron, and thence to December 14, 1982 when the defendant made an oral Motion for mistrial which the Court (McKeever, J.) on said date denied, and thence to December 16, 1982 when the defendant made an oral Motion for acquittal notwithstanding verdict, which the Court (McKeever, J.) on said date denied, and when all the evidence having been submitted, said action was committed to the jury who returned a verdict of Guilty to counts 1 and 2 charging Sexual Assault, 1st Degree and Unlawful restraint, 1st Degree and Guilty to count 4 charging VSNDA 19-481(c), and Not Guilty to the third count, which verdict was accepted and recorded by the Court, and thence to the present time when the defendant appeared for sentence.

Whereupon it is adjudged that the defendant be committed to the Commissioner of Correction for a term of not less than nine, nor more than eighteen years on the first count of said substituted information and not less than two and one-half years, nor more than five years on the second count and a term of six months on the fourth count, to run concurrent making a total effective sentence of not less than nine, nor more than eighteen years.

By the Court

Nicholas J. Cimmino
Chief Clerk

III. SELECTED TRANSCRIPT PORTIONS

A. Transcript Of Testimony Of Officer Peter D. Cameron. (Tr. pp. 444-478—Suppression Hearing)

PATROLMAN PETER D. CAMERON, Badge 80, Wallingford Police Department, 350 Center Street, Wallingford, Connecticut, first having been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION BY MR. LYONS:

Q Officer Cameron, for how long have you been employed by the Wallingford Police Department, sir?

A Approximately six years, sir.

Q And were you employed in that capacity on October 24th of 1980?

A That is correct.

Q What shift were you working?

A The midnight shift. 11:00 to 7:00.

Q And did you have occasion to take an individual by the name of William Barrett into your custody?

A Yes, I did.

Q And at approximately what time did that occur?

A Actually, transporting him back from the city of New Haven to the town of Wallingford, it occurred somewhere around five o'clock that morning.

Q And do you recall what time you got back to the town of Wallingford?

A Approximately 5:30, 5:40.

Q When you say at the town, did you go to a specific place within that town?

A To the Wallingford Police Department.

Q And once you got to the Wallingford Police Department, did you have occasion to advise Mr. Barrett of his so-called Miranda rights?

A That is correct, sir. I did.

Q Can you identify the person whose name is William Barrett who you gave the so-called Miranda rights? Is he present in this courtroom?

A Yes, sir, he is. He is seated over there at the defense table.

Q Is he the person in front of whom I am standing?

A That is correct.

MR. LYONS: May the record indicate he has identified the defendant, your Honor?

THE COURT: It may so reflect.

Q Now, was anyone else present when you advised William Barrett of his so-called Miranda rights?

A The first time during the regular processing procedure, I was alone. Subsequently on two occasions, I was with two different police officers when they advised him of his constitutional rights.

Q Who were those police officers?

A The first case was Sergeant John Genovese. The second case was Detective Lieutenant Murt Howard.

Q Now, the first time that you advised Mr. Barrett of the so-called constitutional rights, did you use anything to assist you?

A Yes, sir. A standard court-issued rights form which is filled out and read to the defendant directly off the sheet and which he signs that. In fact, he was advised of his rights and he did understand them.

Q You used that form to advise him?

A That is correct.

Q Did you read from that form?

A Yes, I did.

Q And you then said you had him initial it or sign it?

A Sign it.

Q And did he do that in your presence?

A Yes, he did.

Q Do you know what you did with those forms? Do you send a copy to the clerk of the court?

A Yes, sir. A copy is attached right to the case itself. When we submit the entire processing package, it goes to our records examination and then the directed copy goes—

MR. LYONS: If there is no objection, I would inspect the clerk's file to see if that is, in fact, in there.

Rather than remove it as an exhibit, I would simply, if it is part of the clerk's file, I will ask the Court to take notice of it. I don't want to disassemble the clerk's file.

THE COURT: I understand.

MR. LYONS: If the Court pleases, if I might take the clerk's file and have the witness refer to it?

THE COURT: Surely.

Q Showing you a document in the clerk's file, do you recognize that, Officer Cameron?

A Yes.

Q How do you recognize it?

A It has my name on the bottom of it dated 10/24/80 and 6:12 in the morning.

Q And is there any other writing on there that you recognize?

A There is a signature on the bottom, of the defendant, William H. Barrett, which he signed it at the time.

Q In your presence?

A In my presence after I read him the notice of rights.

MR. LYONS: I would ask the Court to simply take judicial notice of what's in its own file.

THE COURT: Thank you.

Q Now, where was that done when you first read him his constitutional rights?

A In the processing room, in the patrol squad room in the basement of the Wallingford Police Department.

Q Now, sometime after that, did you again have occasion to advise him of his so-called Miranda rights?

A I did not, sir. But I was present when someone else did.

Q And who would that be?

A The next occasion he was advised of his rights was by Sergeant John Genovese in the Detective Division upstairs in the second floor of the Wallingford Police Department.

Q And at approximately what time did that occur in your presence?

A I cannot give you an exact time.

I would speculate that it was approximately one and a half to three quarters of an hour later, after that other form which I have just looked at, was signed.

Q And do you know whether anything was used to assist Sergeant Genovese in advising Mr. Barrett of his so-called constitutional rights?

A Yes, sir. A standard police pocket rights form, which are issued by our department to carry on duty in our duty briefcase for occasions such as this.

MR. LYONS: I would ask that this be marked for identification at this point.

THE COURT: It may be marked.

(Whereupon, State's Exhibit E for identification was marked—rights form.)

Q Showing you what has been marked as State's Exhibit E for identification, I will ask you to look at that and tell me whether or not you recognize it?

A Yes, sir. This is the rights card read to the defendant by Sergeant John Genovese in my presence, and my signature is on there. Sergeant Genovese's is on there, and the time 0630, the time that it was read is there.

Q That's military time?

A 0630 is military time. And at the bottom is dated 10/24/80 and signed again by the defendant, William Barrett.

Q Now, was that signed by the defendant, William Barret, in your presence?

A Yes.

Q And was it signed after the things on there were read to him?

A Yes, sir.

Q And then when did you put your hand on there?

A Immediately after he signed it, which, of course, was after it was read to him.

Q And you recognize the writing of Sergeant John Genovese, as well?

A Yes.

Q You are familiar with his signature?

A I work with him constantly and I am familiar with his signature.

MR. LYONS: The State will make a full offer, your Honor.

MR. SOLOMON: No objection.

THE COURT: It may be made a full exhibit.

MR. LYONS: Thank you.

(Whereupon, State's Exhibit E was admitted into evidence—rights card.)

Q Now approximately—what was the approximate time between the time that you read William Barrett his rights from the notice of rights form and you heard Sergeant Genovese read the so-called Miranda warnings from the card that has been referred to as State's Exhibit E?

A Again, I cannot be exact on the time, but I believe it was around a half hour.

Q Now, at the time that his rights were read to him, could you describe his physical appearance?

A He was somewhat disheveled. One of his hands was hurt. There was a gash on the back of his hand. It was swollen. He was a little upset over the whole incident as he had been arrested. He seemed alert. He carried on a normal conversation with me. I had no trouble understanding him and he indicated to me on several occasions that he had no trouble understanding what I had to say to him.

Q Have you ever dealt with the people under the influence of alcohol or drugs such that they are intoxicated?

A Yes.

Q Did he appear to be intoxicated, to you, under alcohol or drugs?

A In no way whatsoever.

Q Did he appear to understand your questions regarding the so-called Miranda rights?

A Completely. I asked him several times during my administration of those rights, if, in fact, he understood them; if there were points he wanted me to clarify, and he indicated to me, no, he understood everything fairly well.

Q Was his speech coherent or incoherent?

A Normal.

Q Coherent?

A Yes. I could understand everything he said.

Q Did he respond to you and say he wanted his attorney present?

MR. SOLOMON: Repeat it, please.

Q Did he respond to you when you asked or advised that he could have his attorney present with him?

A During the processing after he was advised of his Miranda rights including his right to have an attorney present during any questioning, I did ask him if he wished to make any statements.

He indicated to me that he would not give the police any written statements but he had no problem in talking about the incident.

Q And without telling me the substance of any conversations, at some point did he, in fact, talk about the incident?

A Yes, he did.

Q And during the course of talking about that incident, did he ever invoke his right to remain silent?

A No, sir. He did not.

Q And, again, this statement was taken, or this conversation with the defendant, was had between—strike that. Withdrawn.

This conversation with the defendant was had in the presence of you and Sergeant John Genovese?

A Yes, sir.

Q In the Wallingford Police Department?

A Correct. In the Detective Division.

Q In an office?

A In an office.

Q Whose office?

A Lieutenant Murt Howard's; the Detective Division's commander.

Q Was he in the office at the time of this statement?

A Not at the time of this interview.

Q And was the door to his office—I assume there was a door?

A Yes.

Q Was the door open or closed?

A It was completely sealed off.

Q There were three of you in that room?

A Yes, sir.

Q Did you make any promises to William Barrett; promising him anything in return for any statement that he might make to you?

A No, sir.

Q Did you make any threats to William Barrett, threatening him to make a statement to you?

A No, sir.

Q Did you use any physical actions to coerce or force him into making a statement to you?

A No, sir.

Q He never invoked his right to remain silent?

A Never.

Q Did he ever ask to stop; that he did not want to go any further without his attorney present?

A No, sir.

Q To the best of your knowledge, from your perspective, was the statement freely and voluntarily given?

A Most definitely.

Q Now, was there some time after that so-called statement given in Lieutenant Murt Howard's office, that a second statement was taken?

A Yes, sir.

Q And were you present during the course of that?

A Yes, sir, I was.

Q And were you present—withdrawn.

Who was the statement by primarily?

A It was a verbal statement. Lieutenant Murt Howard, the head of the Detective Division, was essentially conducting the statement-taking, if you will, and I was present, also.

Q You were present during that?

A That is correct.

Q And how long after that first so-called statement was taken, was the second so-called statement taken?

A I believe it was approximately two hours, but I cannot be positive on the time.

Q You cannot be positive of the time, Officer?

A On the rights card which was marked for identification, the time is 0630. I believe the other interview commenced shortly after 0800 in the morning but the exact time or approximately 0800, one side or the other, a few minutes, I cannot be exactly sure.

Q All right.

MR. LYONS: I have no further questions.

CROSS-EXAMINATION BY MR. SOLOMON:

Q Hi, Officer.

A Hello.

Q When you picked Mr. Barrett up in New Haven, were you with Detective Ginorio?

A Yes, sir.

Q Okay. And was that pick-up accomplished at the New Haven Police Department?

A Yes, sir.

Q And did you indicate that that took place about 5:00 a.m.?

A We arrived there substantially before that. However, we left approximately 5:00 a.m. in the morning.

Q And arrived back to Wallingford about 5:30 or so?

A 5:30, quarter to 6:00; somewhere in that area.

Q When you arrived at the New Haven police station, when did you personally see the defendant, William Barrett, for the first time?

A Approximately half an hour after we arrived after finding out the details of the incident and going about whatever had to be done.

Q Can you estimate for us approximately what time that was, Officer?

A I would say it was approximately 0300 hours.

Q Approximately 3:00 a.m.?

A 3:00 a.m. in the morning.

Q Did you notice, when you first saw William Barrett, did you notice his condition at that time?

A Yes, sir. I did.

Q Could you describe it for us, please?

A It was basically the same as I have described at the Wallingford police station; disheveled, upset over what had happened.

Again, he did have a cut on the back of his hand. It was slightly swollen. The clothing was somewhat disheveled. He appeared to be awake and alert.

Q How about his face? Did you notice anything about the condition of his face?

A I don't recall offhand.

Q When you returned to the Wallingford Police Department, were mug shots taken of Mr. Barrett?

A Yes, sir. As a normal processing procedure.

Q Have you received my subpoena yet to bring those mug shots into court?

A No, sir. I have not.

Q Are they available to your knowledge?

A They must be, sir.

Q Do you participate in the taking of the mug shots as part of the booking and processing?

A Yes, sir. The officer assigned to the booking actually does take those shots?

Q Was that you?

A Yes, sir. On that night, I did.

Q How many mug shots were taken?

A There was a combination of two combined into one on a certain type of camera. You can take a standup frontal and a profile shot.

Q Profile shot?

A Yes, sir.

Q Was this done in this case?

A Yes, it was.

Q When you returned to Wallingford with the defendant, with the accused, with the suspect, was he taken to the basement area of the Wallingford Police Department?

A I don't recall whether he was immediately taken there or whether a stop was made in the detention holding area upstairs until things could be sorted out as to exactly what charges applied. I don't recall if that happened. That is the normal part of the procedure but in this case, I don't recall.

Q I see. The first advising of the Miranda warnings, did that take place at the Wallingford Police Department or did that take place at New Haven?

A I advised him of his rights at the Wallingford Police Department.

Q And that was the first time that you had made that advisement?

A Yes, sir.

Q And you were alone when you made that advisement of rights?

A That is correct, sir.

Q Could you tell us where you were within the Wallingford police station when you advised him the first time?

A Yes, sir. In the patrol squad room booking area in the basement of the Wallingford Police Department.

Q Was that the time that you indicated to Attorney Lyons that you were involved with the rights form?

A That is correct, sir.

Q The same form that is sent ultimately to the court?

A That is correct, sir.

Q Which is contained now in the State—in the clerk's file?

A Yes, sir.

Q Which you have already looked at?

A Yes, sir.

Q Was Mr. Barrett's condition at that time in the patrol squad detention—maybe I am confusing you—in

the patrol squad room, was his condition in your judgment, Officer Cameron, any different than what it was perhaps some two or three hours earlier when you first saw him in New Haven?

A I did not see any difference, sir.

Q Would you say it was the same?

A Yes.

Q Was that accomplished at 6:12 a.m.?

A What's "that", sir?

Q The rights form procedure.

A I believe that was the time on it.

Q Noted on the rights form?

A That is correct, sir.

Q Was it after that that you interviewed Mr. Barrett in the presence of Sergeant Genovese?

A It was some time after that; yes, sir.

Q Did you indicate that—I see it here now; approximately one half to three quarters of an hour later?

A Somewhere in that time frame. After seeing the rights form filled out by Sergeant Genovese, signed by myself and the defendant, I believe the time on that was 0630, which would have made it under a half hour.

Q From 6:12 to 6:30?

A That is correct, sir.

Q How did it occur that a decision was made, Officer Cameron, to attempt to interview the accused, Mr. Barrett?

A After reading the court form, rights form, and having him sign it at 6:12, I asked him if there was a willingness on his part to invoke any of those rights or if he would like to make any kind of statement to the police regarding the incident with which he was charged.

Q What was his response?

A He would give no written statement to the police; nothing in writing; however, he would be more than happy to talk about it. He had no problem with that.

Q "More than happy," are those his words?

A No. I believe his exact words were that he had no problem with that.

Q But he refused to give you a written statement until his attorney arrived?

A That's what he said, sir.

Q Do you know of your own knowledge, Officer Cameron, if Mr. Barrett made an attempt to contact his attorney?

A He was given the opportunity to make several telephone calls and he did make more than one. Who he made those calls to, I did not pay any attention.

Q Was that done outside of your presence?

A No, I was in the room, in the squad room, the same room where the rights form was signed. There is a telephone there that prisoners are allowed to use.

Q But as to who he called, you were unaware?

A I have no idea, sir.

Q Was it then that the interview or the conversation ensued in Lieutenant Murt Howard's office where you indicated you were present and Sergeant Genovese was present?

A Subsequent to the original rights form downstairs, yes, he was taken upstairs to the Detective Division; Lieutenant Howard's office and that conversation did ensue.

Q Did you accompany Mr. Barrett upstairs to the Lieutenant's office?

A Yes, I did.

Q Was Sergeant Genovese with you at that time, or he was already upstairs?

A I believe he was already upstairs.

Q Before the conversation ensued, Officer Cameron, was it then the rights card process came into play?

A Yes.

Q And you indicated to Attorney Lyons that you read the card to Mr. Barrett?

A I did not, sir.

Q Who did?

A Sergeant Genovese did.

Q I am sorry; and you were present while this was going on?

A Yes, sir.

Q Were you closeted in Lieutenant Murt Howard's office at this time?

A Yes, sir.

Q Was the door closed?

A Yes, sir, it was.

Q And you indicated that the card was signed by Mr. Barrett?

A That is correct, sir.

Q And it was then signed by you and Sergeant Genovese?

A That is correct.

Q And dated?

A Yes, sir. I am sorry, sir; that is incorrect. Mr. Barrett dated the card when he signed it.

Q At your request or Sergeant Genovese's request?

A I don't recall. It is a standard form. There is a date and signature area.

Q I see. Where was Lieutenant Murt Howard, if you know, when this interview, when this conversation was taking place?

A I don't know exactly. It was before his normal tour of duty began.

Q What time does he get on?

A Approximately eight o'clock he arrives.

Q And this would have been approximately 6:30?

A Between 6:30 and quarter to 7:00.

Q Was it a question and answer process or was it a narrative on the part of Mr. Barrett?

A We allowed him to narrate what he wanted to tell us. We interjected some questions.

Q As he was going along?

A As he was going along.

Q Did he answer your questions?

A Not all of them.

Q Did he refuse to answer some of your questions?

A No, he did not. He just simply ignored them and continued on with his narrating.

Q I see. The fact that he refused to answer some of your questions, Officer Cameron, does that in your judgment indicate an unwillingness on the part of Mr. Barrett to continue with the conversation?

A None whatsoever. When he would not answer a question that was directed to him, he would continue on with the narrative as if we had not even asked the question.

Q Did that satisfy you and Sergeant Genovese?

A Yes, it did.

Q Was there more than one question that was assumed to be—that Mr. Barrett—refused to answer as put to him by either you or Sergeant Genovese?

A I don't recall exactly if there was one or more.

Q So, essentially, Officer Cameron, it was a narrative at this time?

A Yes, sir.

Q As far as this particular interview—

A That is correct.

Q —did Mr. Barrett indicate to you during this conversation or this narrative, Officer Cameron, that—did he ask you, "Is this just between you and I"?

A I don't ever recall that, sir.

Q During the time that Mr. Barrett was first picked up by you and transported from New Haven to Wallingford during the booking procedure involving the taking of mug shots and the procedures and during this initial interview, Officer Cameron, did Mr. Barrett ever request of you that he was seeking or he would like medical attention?

A He indicated his hand, I believe it was his right hand, but I am not positive, the one that had a gash on the back of it, was somewhat of a bother to him. It was bothering him.

We did ask him did it need medical attention or how he felt about it. He said it was bothering him some; however, it was not a great problem to him.

Q Did he use the words: it was not a great problem, that series of words?

A I don't recall exactly what he said.

Q In your judgment was Mr. Barrett in a fit condition considering the circumstances, to respond in a narrative to you and Sergeant Genovese at that time?

A Yes, sir, he was.

Q And this was a judgment that you made?

A Yes, sir. It was also based on the fact that he seemed willing to narrate what he—supposedly, was his side, his version of the story.

Q I see. After this session was concluded, what happened next, Officer Cameron?

A I don't recall exactly what happened in the period between the interview with Sergeant Genovese and a second interview which occurred approximately at eight o'clock or thereabouts with Lieutenant Howard.

Q Did you stay with it—did you stay with Mr. Barrett during that interim period or were you involved in other duties at that time?

A I honestly can't remember exactly what transpired.

Q Okay. What prompted the second session or interview with Lieutenant Howard?

A During the first interview with Sergeant Genovese, approximately given at 630 hours, a tape recorder was set up in Lieutenant Howard's office to tape-record this verbal session with the defendant. However, the tape recorder was malfunctioning and upon checking it, after completion of that first interview, Sergeant Genovese found that there had been no recording, in fact, made. The second attempt with Lieutenant Howard was again with the same tape recorder and attempted to tape-record the defendant.

Q Okay. Let me backtrack a second if I might, Officer Cameron.

You indicated that the tape recorder was in Lieutenant Howard's office while the first interview was going on?

A That is correct.

Q Was the defendant, William Barrett, aware that the narrative was being recorded?

A I don't know, sir. During the time I was present, he was not told.

Q He was not told?

A He was not told by myself or Sergeant Genovese.

Q Was the tape recorder in such a position that it would not have been observed readily by Mr. Barrett?

A I honestly don't recall whether it was at that time, during the first interview.

Q But you do state it was in Lieutenant Howard's office?

A Yes, it was.

Q So you're saying that the malfunctioning of the tape recorder device prompted the second interview of Mr. Barrett where you were involved and Lieutenant Howard was involved?

A That is correct.

Q Where did that interview take place?

A In the same office.

Q Same office?

A Correct.

Q And, again, who was present?

A Lieutenant Howard and the defendant and myself.

Q Was it foreclosed in Lieutenant Howard's office?

A Yes.

Q So there was just the three of you there?

A That is correct, sir.

Q Was the same tape recorder used this time around?

A Yes, it was, sir.

Q Was Mr. Barrett aware that the second interview was being recorded?

A I don't know, sir. I did not tell him. Lieutenant Howard did not, in my presence, tell him.

Q And, again, the tape recording device would not have been readily available to the defendant?

A It was on Lieutenant—

Q Would it have been readily observable to the defendant?

A From my point of view, I knew it was there.

Q You don't recall, or you have said you did not tell Mr. Barrett it was being recorded?

A That is correct.

Q Was there any difference that you noted in Mr. Barrett's condition from the time of the first interview at

approximately 6:30 to the time of the second interview which you indicated was approximately eight o'clock, in your judgment, Officer Cameron?

A No, sir. He was still quite upset over the whole incident; the fact that he had been arrested. He was quite upset again. He was more than willing to narrate his version of what had happened.

Q Was there any conversation or request made by the defendant, Mr. Barrett, or was there any offers made by either you or Lieutenant Murt Howart to have his hand looked after before the second interview commenced?

A Again, I am not positive about what transpired between the two interviews.

I did take both Mr. Barrett and another subject who was arrested with him to Veterans Memorial Hospital. I do not remember that exact sequence of events; whether it was between interviews, after the interviews or whether it was—it was in that time period.

Q I see. But did there come a time, when you are not sure, that the suspects were transported to Veterans Memorial Hospital?

A Yes, sir. We were worried about the person arrested with him who had an injury to his leg, who finally did say he wanted to go to the hospital and have it looked at.

Q But as you stated, both subjects were transported?

A Yes, sir.

Q To your knowledge, were they looked at and treated by hospital personnel at Veterans Memorial?

A Yes, sir. I stood by in the emergency room area while they were treated.

Q What time did the first interview end?

A I cannot be specific on the time.

Q Roughly?

A Approximately seven o'clock.

Q Seven?

A I would say so, sir.

Q Commenced about 6:30?

A Shortly thereafter, yes, sir.

Q So the narratives took, would you say, approximately a half hour?

A Yes, sir.

Q You don't recall after seven o'clock whether the transport to the hospital occurred then or whether it occurred after the second interview?

A No, sir, I am sorry. I don't.

Q Did the second interview last as long or was it shorter than the first one?

A I believe it was somewhat shorter but not that much.

Q Who was involved in the advising of rights for interview number two?

A Lieutenant Howard had the same card that Sergeant Genovese did. He asked me if, in fact, the defendant had been advised of his rights. I stated he did. Lieutenant Howard went ahead and read this card to him, again, another set of those Miranda rights.

Q The small card?

A That is correct, sir.

Q Do you have those cards, Officer Cameron?

A I don't have one on my person at this time. I keep one in my uniform.

Q It is standard procedure?

A That is correct.

Q In this situation, do you have the second set of cards or the second card that was signed by the defendant?

A I do not. I believe Lieutenant Howard has it. He keeps it in his—

Q I mean the actual card in this case that was signed by Mr. Barrett. Do you know where that is?

A No. Lieutenant Howard retained the position of that. I don't know what he did with it after that time.

Q I see. And so that involved the reading of the terminology of the card?

A Yes, sir.

Q The asking if the defendant understands?

A That is correct, sir.

Q And did Mr. Barrett indicate that he understood?

A Yes, sir, he did.

Q And did he subsequently sign the card?

A No. In this case Lieutenant Howard who was conducting, basically, conducting the interview, felt that since there was a signed card from just a few minutes actually, that the reading of the card would be sufficient.

Q So there was no signing by Mr. Barrett of an additional rights card?

A No, sir.

Q The second interview terminated, did you indicate, sometime after eight o'clock?

A The second interview began sometime around eight o'clock.

Q When did it terminate, Officer?

A It terminated, I believe, it was slightly shorter than the first one. Therefore, it would have been around 8:20, 8:25.

Q I see. Was it after the second—withdrawn.

Was the format of the second interview essentially the same as the first interview?

A Yes, sir.

Q And the narrative?

A Yes, sir.

Q Were there questions proposed by either you or Lieutenant Murt Howard during the second interview?

A There were questions that were not really questions but clarifications in his narrative. . .

In his narrative, the defendant would say something and which neither of us was — more or less a little bit out of context or the meaning was not clear to us and we would ask him what was that.

Q You did impose something for clarification purposes?

A I did not. I believe there were one or two questions during the course of this interview similar to the first one, but I don't recall how many or exactly what they were.

Q Were they asked by Lieutenant Howard?

A I believe so.

Q Did you remain silent during that entire second interview process?

A No, sir. Lieutenant Howard had just come to work and was not completely familiar with every minute detail of the case. And he looked to me that all there was had been covered and the narrative was essentially what was given to us the first time. The two narratives were the same.

Q Did you repeat, before Mr. Barrett completed his second narrative, did you repeat the first narratives to Lieutenant Murt Howard to indicate to him what had been earlier discussed?

A No, sir.

Q Did you carry the ball, so to speak, during the second interview because you were more familiar with the situation?

A No, sir. I would not say that.

Q It was joint effort?

A I think that would be fairer to say.

Q Was there any resistance on the part of Mr. Barrett when an attempt was made by either you or Lieutenant Howard to clarify a particular point in the course of the narratives?

A No, sir. None whatsoever.

Q Was it subsequently determined that the tape recorder had malfunctioned again after the second interview?

A Unfortunately, yes, sir.

Q Was it then, Officer Cameron, that you prepared your report?

A Yes, sir. After all that, and I am not positive when we went to the hospital, but after that was all done and every procedure was completed, et cetera, I did my report.

Q After the second interview, was Mr. Barrett returned to the detention area or was he brought somewhere else?

A He was brought ultimately to the detention area to await ten o'clock to bring him to court for arraignment.

Q Would that have been at GA-7 in Meriden?

A GA-7 in Meriden, yes, sir.

Q Did you take part in the transport of Mr. Barrett?

A No, sir.

Q Do you know who did that?

A It would have been the court liaison officer at that time.

Q Was that Lieutenant Jsupin?

A Probably, it was. He has since retired. I am not sure of the exact date.

Q That would be a matter of record, would it not?

A Yes, sir.

Q Just one more point, Officer Cameron.

The second interview, then, it was only a reading of the rights card by Lieutenant Howard to Mr. Barrett?

A That is correct, sir.

Q There was no signing of that rights card by Mr. Barrett?

A That is correct.

Q You already had a rights card. You already had a rights form executed by Mr. Barrett from the prior to the initial interview?

A That is correct.

MR. SOLOMON: May I have one quick moment, your Honor?

THE COURT: Indeed.

Q Do you recall, Officer Cameron, if Mr. Barrett ever indicated to you what had happened to him in New Haven?

A I don't recall whether it was narrated to me by him, by Mr. Barrett or by members of the New Haven Police Department. I do recall that there was a story of something that had occurred there, a bar fight. I don't recall if Mr.

Barrett told me or members of the New Haven Police Department told me.

Q Did you have knowledge that Mr. Barrett was a party to that in that bar fight?

A Again, yes. I don't recall who told me but there had been an altercation between him and evidently from the story that was told to me second-hand, the brothers of the victim.

MR. LYONS: I am going to object at this point, your Honor. I don't know what its relevance is. It is a good fishing expedition for discovery but as far as relevance is concerned, I don't know what the relevance is.

THE COURT: I will allow the question. I think I see where counsel is going with it.

MR. SOLOMON: Thank you, your Honor.

Q Did you finish your answer?

A No, sir. He was involved in a bar fight with the brothers of the victim in this incident.

Q You have no further details as to what happened?

A As far as the exact things that happened, no, sir, I don't.

MR. SOLOMON: Okay. Thank you, Officer.

MR. LYONS: I have no questions of this officer.

* * *

B. Transcript Of Testimony Of Officer Murt Howard—Partial. (Tr. pp. 482-520—Suppression Hearing)

DETECTIVE LIEUTENANT MURT HOWARD, 350 Center Street, Wallingford, Connecticut, first having been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION BY MR. LYONS:

Q Lieutenant Howard, you are employed by the Wallingford Police Department?

A Yes.

Q How long have you been employed by the Wallingford Police Department?

A Since March of 1963; March 17, 1963.

Q How long have you been employed in the capacity of lieutenant in the Wallingford Police Department?

A Since 1976 I have been assigned to the Detective Division. I was assigned to the Patrol Division for one year prior to being transferred to the Detective Division.

Q Were you employed by the Wallingford Police Department as an officer on October 24th of 1980?

A Yes.

Q And do you recall the shift you were working on that particular day?

A 8:00 to 4:00.

Q Do you recall at about what time you got to work on that date?

A Approximately quarter to 8:00.

Q Now, on that date, after you got to work, did you have occasion to meet with an individual by the name of William Barrett?

A Yes, sir.

Q And is that person present in this courtroom?

A Yes, he is.

Q And could you identify him, please?

A He is the gentleman in the blue suit.

MR. LYONS: May the record reflect he is pointing to the defendant in this case?

THE COURT: It may so reflect.

Q And under what circumstances did you meet Mr. Barrett, if you would?

A Upon coming into the Detective Bureau, Sergeant John Genovese was there and he had approached me and advised me that Mr. Barrett was there, and he was cooperating.

He asked if I could interview him, gave me a brief rundown as to what transpired. He told me he attempted to record that conversation and it was not recorded. As a result of that, I told him that I would speak to him. Mr. Barrett was with Officer—

MR. SOLOMON: Your Honor, could we have question and answer, please, rather than a narrative? I am finding it a little hard to take everything down here.

THE COURT: Very well.

Q At some point, did you speak to Mr. Barrett?

A Yes, sir.

Q Did you advise him of his so-called constitutional rights?

A Yes, sir, I did.

Q Did you use anything to assist you in that?

A I read it from the Miranda warning card.

Q This Miranda warning card, is that something that you keep on your person?

A Yes, I do.

Q And where do you keep it?

A My billfold.

Q And do you have one on you at the present time?

A Yes, sir. I do.

Q And did you actually read him his so-called Miranda rights from that card?

A Yes, I did.

Q Could you demonstrate the manner in which you advised the defendant of his so-called Miranda rights?

A Well, I had read from the card his rights to him. I asked him if he had understood those rights. I asked him how far, what his education was. He said it was twelfth grade. He

got a twelfth grade education. I asked him if Officer Cameron had given him his rights previous to this. He stated that he did.

Q The other time that you advised him of his so-called Miranda rights, did you have an opportunity to observe his physical appearance?

A Yes, sir.

Q And could you describe your observations?

A His hand, he had a swelling on his right hand, I believe, it was. And there was a sort of scratch mark on it. And his one eye, I forget which one it is at this time, had some discoloration.

MR. LYONS: I would ask that these five photographs be marked as exhibits for suppression hearing only.

THE COURT: They may be marked.

MR. SOLOMON: Did you show them to Lieutenant Howard?

MR. LYONS: No. They are being marked for identification.

(Whereupon, State's Exhibits, F, G, H, I and J were marked for identification only.)

Q Lieutenant, showing you what has been marked as State's Exhibits F, G, H, I and J. I would ask you to examine those.

(Whereupon, the exhibits were handed to the witness.)

Q Do you recognize each of those photographs, Lieutenant?

A I recognize these as being Mr. Barrett. I do.

Q Now, are these photos a fair and accurate representation of what Mr. Barrett's physical appearance was like as far as the photos go, of course,—

A Yes.

Q —on the morning of October 24th of 1980?

A Yes.

Q And that would be at about the time that you saw him at about quarter to 8:00 on the morning of October 24th of 1980?

A Yes. As best as I can remember.

MR. LYONS: I would offer them at this point as exhibits for purposes of the suppression hearing, only.

MR. SOLOMON: No objection, your Honor.

THE COURT: They may be marked full exhibits.

(Whereupon, State's Exhibits F, G, H, I and J were admitted into evidence.)

MR. SOLOMON: Have you seen the photographs, your Honor?

THE COURT: No.

Q Officer, having reference to State's Exhibit F, can you tell us what is that photograph, please?

A There is a slight scratch-type mark on the top of the hand and there is some swelling on the hand in comparison with the other hand.

Q And that's William Barrett's hand?

A Yes, sir.

Q Was that readily observable to you on October 24th of 1980?

A Yes, sir. It was.

Q And exhibits—we're referring to State's Exhibit I, could you explain what that is, for the record?

A It is another picture of the hand. And on this picture, the other hand looks like it is swollen a little bit. But I just recall the one hand that was swollen.

Q Would that be the right or the left hand?

A That would be this hand, the right hand.

Q And would you explain what you see in State's Exhibit J?

A The photograph is a photograph of his hand and there appears to be some swelling on this hand.

Q Which hand is that?

A That would be the left hand.

Q And referring to State's Exhibit H, would you describe what's in that photo?

A It is a standup, side view of Mr. Barrett, his clothing which is a leather jacket, dark trousers and white shirt.

Q Anything strike you with respect to his physical appearance in that particular photo?

A It is not that clear but it does tend to show what appears to be a little discoloration.

Q Where would that be?

A Under the eye.

Q Now, in examining State's Exhibit G a little bit closer, would you describe for the record what that photograph is?

A This is a front view, standup, and this one is also the same thing, standup photograph, front view, and it appears, the left eye, appears to be a discoloration.

Q Is there also swelling under his left eye?

A It appears that way, yes, sir.

Q Was that visible to you on that particular day when you—

A I just recall the discoloration. The amount of swelling, I don't recall at this point.

Q The amount you don't recall?

A No.

Q Does the picture help refresh your recollection in any way?

A As best as I can state it.

Q Now, have you ever dealt with people who are under the obvious influence of alcohol or other intoxicating substances?

A Yes, sir.

Q And in your opinion, did the defendant, William Barrett, appear to be intoxicated by either alcohol, drugs or other intoxicating substances?

A No, sir.

Q Did he appear to understand your reading to him of his rights and any questions regarding his rights?

A I asked him if he understood his rights.

Q And what did he say?

A He stated that he did.

Q And was his speech coherent during the reading of the rights?

A Yes.

MR. SOLOMON: Excuse me. Whose reading of the rights?

Q While you were reading him his rights and he replied to you, was his speech coherent?

A Yes.

Q And when you asked him whether he wanted an attorney present, did he respond?

A He said that he was willing to talk about it verbally but he did not want to put anything in writing until his attorney came. That was all he said.

Q Now, at some point, I assume he did answer your questions or make a statement?

A Yes, he did.

Q And during that statement or series of answering questions, did he ever invoke his right to remain silent?

A No, sir.

Q Did you coerce him in any way to answering questions or making statements with any threats or bodily actions?

A No, sir, we did not.

Q Did you promise him anything in return for answering questions or making a statement?

A No, sir.

Q And he did make some statements and answered some questions in response to your questions; correct?

A Yes, sir. He did.

Q To the best of your knowledge, were the responses that he gave to your questions and any statements he made freely and voluntarily given?

A Yes, they were.

Q And did he ever refuse to answer any questions at any time?

A It is not a point of refusing to answer. He had, basically, related his story as he had to say. As I would ask a question, he would answer it. But, basically, he continued to tell his story. He did answer almost all the questions, and I can give you an example.

Q Let me ask the question this way. Are you trying to say that he might not have said something responsive to the question; he continued talking but he never refused to talk?

A No, sir.

Q Now, again, with respect to his physical appearance, did you have occasion to ask him how he might have gotten that discoloration and swelling under his left eye?

A I asked him what happened. He said that there had been a problem in New Haven.

MR. SOLOMON: A problem, did you say?

MR. LYONS: Yes.

MR. HOWARD: Yes. I did not go into the specifics. I had—Sergeant Genovese had stated there had been a fight and I did not ask him what the specifics were as far as the fight goes.

Q Did he give you any indication who that fight was with as opposed to police officers versus people?

A It was families, was my understanding—

Q Not police officers?

A —of Mary Ann Jones.

Q Not police officers. And with respect to the swelling and mark on his hand or marks on his hand, did you ask him how it came about that he got that on his hand?

A I did not go into any details as to what happened to his hand with him, other than there was a fight with the family. That's what he said.

Q Something to do with other civilians and not police officers in New Haven or Wallingford?

A That is correct.

Q Officer, I am sure you know what was on your card but, unfortunately, the record does not.

Could you please tell us exactly how you advised the defendant of his rights?

A Would you like me to get my card?

Q Do it right now just the same way you did it that morning, on October 24, 1980. Just so the record is clear with respect to what you said to the defendant.

A I always carry two cards; one has a dying declaration on it, which on the back of the rights card I have another card. I always have one or two others with me that I carry on my person at all times.

MR. SOLOMON: Your Honor, excuse me; is the representation being made that either one of those cards was the exact card that Lieutenant Howard read from on October 24, 1980?

MR. LYONS: No.

MR. SOLOMON: Maybe it requires a little more foundation, your Honor.

I will object because I don't feel that the reading of these cards have any relevance, your Honor, unless it can be shown that this card was the same card he read to him on October 24, 1980, or unless there is going to be testimony that all the cards are identical. I have a problem with that, frankly, your Honor.

THE COURT: I believe that he has already given that indication.

MR. LYONS: I will ask the question.

THE COURT: But not in those specific words.

Why don't you ask him?

Q Is the card that you're about to read from, identical in terms of what's on it with the card that you used to advise William Barrett in the so-called Miranda rights on the morning of October 24, 1980?

A Yes. Because we have a series of these that came in a box.

Q While it was not the same physical piece of paper, it contained the same so-called Miranda rights on it?

A Yes.

Q With that, could you please demonstrate for the Judge exactly how you advised the defendant of his rights on the morning of October 24, 1980?

A It states, "The constitution requires that I inform you of your rights. You have the right to remain silent. If you talk to any police officers, anything you say can and will be used against you in court." I asked him if he understood what that meant.

Q And what did he say?

A He said he did.

Q Right?

A And I told him, "You have a right to consult with your lawyer before you are questioned and you may have him with you during questioning."

And I asked if he understood that. "If you cannot afford a lawyer, one will be appointed to you if you wish before any

questions. If you wish to answer any questions, you have a right to stop answering at any time. And you may stop answering questions at any time if you wish to talk to a lawyer. You may have him with you during any further questioning."

Q Now, those are the rights that you read to the defendant that morning?

A Yes.

Q Now, did you ask him whether or not he understood those rights?

A Yes, I did.

Q What did he say?

A He said he did.

MR. LYONS: I have no further questions.

Thank you very much.

CROSS-EXAMINATION BY MR. SOLOMON:

Q Good morning, Lieutenant Howard.

A Good morning, sir.

Q The interview process that occurred when you were involved, Lieutenant, with—did that take place—withdrawn.

Where did the second interview occur?

A In my office in the Detective Division.

Q Was anyone else present?

A Yes, there was.

Q Who was present?

A Officer Cameron.

Q And?

A Myself.

Q Anyone else?

A No, sir.

Q Was it your understanding, Lieutenant Howard, that the first interview of the defendant, William Barrett, also took place in your office?

A Yes, sir. It was.

Q And was the sole reason for the second interview the fact that Sergeant Genovese indicated that the tape recording had malfunctioned?

A Yes, that is correct.

Q So if there had been an effective recordation of the first interview, you would not have talked to the defendant; is that correct?

A That is a strong possibility, yes, sir.

Q How much time elapsed between when you first arrived at the Wallingford police station and the time you were actually in your office talking with the defendant, William Barrett?

A I would probably say maybe, maximum time would be 15 minutes.

Q Fifteen minutes?

A Approximately 15 minutes.

Q You arrived at work, I think you indicated in response to Attorney Lyons' question, about 7:45?

A Approximately, yes, sir.

Q And it was Sergeant Genovese that filled you in on what was going on?

A Yes, sir, he did, because he had called me earlier in the evening at home requesting a detective as a result of the investigation. And when I came in, he explained it to me.

Q Who was the investigating officer assigned to this case?

A Detective Miranda and Officer Cameron were assigned.

Q And Detective Miranda is actually Detective, or was Detective Ginorio?

A Was Detective Ginorio, yes, sir.

Q She is married now?

A Yes, sir.

Q You were not present, were you not, during the picture-taking procedure?

A No, sir.

Q I make specific reference to the five photographs that were shown you moments ago. That was accomplished by Sergeant Genovese?

A I don't recall who specifically took those photos. I really cannot answer that.

Q Would there be a clue on the photo, itself, as to who took them?

A No. The person who took them is aware of who took those photos. On the back it would have the name of the officer.

Q Would that be the person who took the photographs?

A Yes, sir. It would be.

Q Would you just look at these and see if there is a clue as to that?

A Yes. All of these indicate Sergeant Genovese, yes.

Q Did you know, Lieutenant Howard, of the existence of these photographs before this morning?

A I have not seen those photos; no, I have not.

Q At all?

A No, sir.

Q They were part of the booking process and the procedures at the Wallingford Police Department when the two suspects were there on October 24, 1980?

A The film, itself?

Q The taking of these particular photographs.

A Yes, they would be part of the case.

Q And subsequently placed in the Wallingford Police Department file?

A It would have been placed in the file, yes, sir.

Q Do you recall—and this is important—do you recall the condition of Mr. Barrett at the time that you questioned him on October 24, 1980, or is your recollection of his condition refreshed now by these photographs, Lieutenant?

MR. LYONS: I am going to object to that, your Honor. It could be both.

THE COURT: Let him answer it.

MR. SOLOMON: I think the lieutenant was going to answer. I am not trying to suggest one thing or another.

THE COURT: I think if that is the situation, the witness can testify to that.

Q Can you answer that?

A It is a combination of both.

Q Your own recollection plus a refreshing through an examination of these photographs?

A Reconfirming.

Q Your observations then?

A Yes, sir.

Q And is it fair to say that your recollection of Mr. Barrett's condition is reinforced by your observations of these photographs at this time?

A Yes.

Q You are not privy, Lieutenant Howard, to the earlier procedures at the station when the suspects were first transported there and you were not privy to the first interview that occurred at the Wallingford Police Department?

A No, sir.

Q Your involvement was solely a second interview of the accused in the company of Officer Cameron?

A Yes, sir.

Q When you were in the room talking to the defendant, were his responses, Lieutenant Howard, by way of a narrative or was it more a question and answer situation?

A I asked him if he would tell me what happened, and he began to explain what transpired. And there were times when I did ask him questions, yes.

Q What was the reason that you interrupted the narratives, so to speak, to ask questions?

A Well, the reason for it, I wanted to try to get a few things in perspective and to be more specific.

Q Did you have the personal benefit at that time of any other documentation furnished you by any member of the Wallingford Police Department to assist you in your interview of Mr. Barrett?

A No, I did not.

Q Did you have any statements that might have been taken earlier in the evening to assist you in the questioning of Mr. Barrett?

A No, I did not.

Q Either from the complainant or from the defendant, himself?

A No, I had nothing.

Q Did you have the benefit of Sergeant Genovese's notes, if there was such a thing, to assist you in the questioning of Mr. Barrett?

A The only thing I had was the verbal story from John Genovese; Sergeant Genovese.

Q Which was then in your mind?

A Yes.

Q Okay. Nothing written in front of you?

A No. Nothing.

Q So based on what Sergeant Genovese had told you, prior to your commencement of the interview, this assisted you in your questioning of the defendant, William Barrett?

A Yes. As well as his narrative.

Q During the interview of Mr. Barrett, what was Officer Cameron doing?

A He was standing in the office assisting. It is a small office. Our facilities are quite small.

Q Was he participating in the questioning procedure, if you can recall, Lieutenant Howard?

A Yes. Pete did ask him a question or two. And towards the end, I had asked Pete if there was anything else, maybe he would like to ask, and he said there were a few things. But exactly what he had asked him, I really don't recall specifically.

Q Would you say it is safe to say that you carried the ball pretty much yourself?

A Well, I would say basically Mr. Barrett carried the ball. I had asked him questions and Officer Cameron had asked him a few questions, also.

Q When you posed your questions to Mr. Barrett, either you or Officer Cameron, were they answered by Mr. Barrett?

A I would say that the percentages of time they were; not all the time. I did not get specific answers all the time.

Q There were some questions that were not answered by the defendant, is that correct?

A It was not that they were not answered; it is that he continued on with his story.

Q Not in response to your questions?

A If I can give you an example.

Q I'd rather not get into the contents, Lieutenant. I think you understand why.

Did the narrative then go off the track to your question or was it in line by way of an explanation to your questioning?

A It would be, he would explain what he meant by what he said.

Q I see.

A Okay. He would explain what his meaning was as he gives his narrative.

Q I see.

A And I probably asked maybe one or two specific questions that I did not understand and wanted to clarify; or maybe three, somewhere along that line.

Q Did Officer Cameron ask a like number of questions?

A Yes, he did.

Q Were answers given to Officer Cameron's questions, as best you can recall?

A Yes. Mr. Barrett was cooperative.

Q Did there come a time during the questioning process and the narrative process of the interview that you were involved in, Lieutenant Howard, that Mr. Barrett requested medical attention?

A He was going to be given medical attention, okay? He did not request it in my presence.

Q Had he requested it before, if you know?

A I don't really know. To my knowledge, no.

Q You don't know or to your knowledge, though?

A I don't recall, to be honest with you. I don't recall that being discussed.

Q Being discussed with you?

A Yes. I do recall he had some injuries. And as far as medical attention, I don't really recall. I believe Officer Cameron may have stated he was going to take him to the hospital. I think it was Meriden Hospital; Meriden-Wallingford Hospital.

Q Did Officer Cameron mention that to you before the commencement of the interview?

A No, he did not.

Q Or was it during the interview itself?

A It was some point in time when I was in the office.

Q While it was going on?

A Or at the end of the conversation. I don't recall the exact sequence.

Q So plans were, in effect, made prior to the commencement of the interview to transport Mr. Barrett to either a hospital or to a doctor?

A Our policy is no matter what the injuries are, if there are injuries, the person is in our custody under arrest, we take these individuals for medical treatment; so that there is no responsibility placed on the police department.

Q That's your concern, is it not?

A No. You are also concerned that you don't want anybody who is injured or in pain to be subject to it.

Q I am sorry?

A It would be quite inhumane to let somebody suffer.

Q I agree.

A And that's the priority also; there were two priorities.

Q Was there a judgment call here on the part of the Wallingford Police Department that, okay, let's get the questioning out of the way, then we will take care of the medical aspect?

A I don't think you could put it in that light.

Q How would you put it?

A I would just say that he had a hand injury and a facial injury and he was going to be treated.

Like I told you, it is a two-prong situation whereby you are concerned, and depending upon the seriousness of the situation, how promptly you react to it if there is an immediate demand for it. If I was also—someone told me they needed medical attention, you make it a point to give it to him.

Q If that were to be the case, then the medical attention would have received priority; is that correct?

A As far as I was concerned or I am concerned.

Q There is no question, Mr. Barrett was in your custody or the custody of the Wallingford Police Department at that time?

A That is correct.

Q There is no question that at this time it was approximately eight o'clock in the morning?

A That is correct.

Q And procedurally, were plans made, if your know, Lieutenant Howard, were plans made to transport the suspects for arraignment purposes to GA-7 in Meriden that morning?

A Okay. That morning I did ask Mr. Barrett if he had been arrested before. He said he had not. I asked him if he knew what was going to happen. He said he was not sure. I explained to him the procedure that was going to occur that morning. A bond was set. If he does not make the bond, he

will be taken to court and arraigned at which time his bond would be kept the same, could be lowered or could be raised. Okay. And I explained that he would be presented in front of the judge that morning because he was not sure of the procedure. He said he had not been arrested before.

Q Did he appear to you to be nervous and upset, Lieutenant Howard?

A No. He was not nervous in my presence. He spoke freely. He was eating a hard roll and a cup of coffee.

Q In your office?

A Yes.

Q Did he request that or did you bring it in for him?

A We brought that in for him. Sergeant Genovese got it picked up.

Q And it was brought in for him?

A Yes.

Q Did he seem in any pain or discomfort in your judgment?

A I didn't detect any pain or serious discomfort. I am sure his hand was sore because of the swelling. I am sure it must have been all sore.

Q How about his face?

A There was discoloration under the one eye; okay.

Q And some swelling, I think you testified to?

A There was a little swelling.

Q In which you saw in the photograph, also?

A Yes.

Q If, in fact, a decision had been made, Lieutenant, to hold off on the questioning and transport Mr. Barrett to the hospital, would that have upset the procedures that you were involved in at that time?

A No. Because if he had to go to the hospital at that time, he would have been taken there and if he requested, we would have taken him.

Q You were not concerned about a particular time factor, were you, Officer Howard? The fact that he had to be in court at a certain time?

A No.

Q He could have been brought into court in the afternoon, for that matter; is that correct?

A Yes, he could have.

Q There is no set time on when a person is arraigned?

A They try to make it a set time but actually arraignment could be made at any time.

Q Did—withdrawn. Did Mr. Barrett indicate to you that he was successful in reaching his attorney?

A My understanding is he had called the attorney and that he would tell us verbally what transpired. He would not put it in writing until his attorney came, okay.

Q Was this told to you on more than one occasion or just the one time?

A As he came into the office, it was told to me.

Q By?

A By Mr. Barrett.

Q Had Sergeant Genovese mentioned anything along those lines?

A Officer Cameron, I think, also mentioned it to me. He did make some telephone calls and Sergeant Genovese mentioned that he made some calls and Officer Cameron also mentioned that he made some calls.

Sergeant Genovese said, "He will tell you verbally what transpired but he will not reduce it to writing until his attorney comes to the police department or comes to headquarters."

Q I see. So it was your understanding that Mr. Barrett's attorney was on his way. Is that correct?

A I really cannot answer that. My interpretation was: that is true.

Q I see. Did it become important to you then because of that, Lieutenant Howard, that the second interview be accomplished?

A Because of that particular reason?

Q That is right.

A The particular reason was that there was a malfunction in the tape recorder. That is one of the main reasons on the interview. Also, it was not to try to beat the attorney coming in.

Q Was the tape recorder set up right in your office, Lieutenant Howard?

A Yes, it was.

Q Is that the normal procedure?

A On felony investigations and interviews, it is; if possible.

Q Was Mr. Barrett told that his narrative was being recorded?

A No, he was not.

Q He had already indicated either directly to you or through one of your fellow officers that he did not want to make a written statement. Is that correct?

A That is correct.

Q Is it not consistent when a defendant or an accused indicates, Lieutenant Howard, that he does not wish to make a written statement but then a recording is made of his verbal statement—

MR. LYONS: I am going to object to that. That is a question for the Court.

THE COURT: I agree. I will sustain the objection.

MR. SOLOMON: All right, your Honor. I take an exception, please.

THE COURT: Exception may be noted.

Q Were you told by either Detective Genovese or Officer Cameron that Mr. Barrett was advised of his rights at an earlier point in the evening?

A Was I told?

Q Were you told?

A Yes, I was told by Officer Cameron.

Q Did he indicate what that advising rights entailed?

A I asked in my office. I asked if he had given his rights, and he said he did.

Q Who did you ask that of?

A Officer Cameron and also Mr. Barrett. And I in turn also told him I was going to read him his rights. Yes.

Q And that was when you read him the card?

THE COURT: Did you just indicate that the defendant had told you that he had already been advised of his rights?

MR. HOWARD: He agreed.

Q But that was in response to your posing the question?

A That is correct.

Q He did not volunteer that to you?

A What do you mean?

Q It was not a spontaneous thing. It was in response to what you had asked him?

A I don't recall exactly what I asked. I asked if that was correct and he said yes.

Q Were you told of the rights form and rights card procedures by Officer Cameron before you commenced your questioning?

A You mean specifically?

Q Specifically.

A No. He told me he gave me his rights.

Q But as far as what that entailed, you do not know or you did not know at that time?

A I asked Officer Cameron if he signed the card, I believe. I believe I asked him that question.

Q Do you remember what Officer Cameron said to you?

A Yes.

Q Do you know from a time reference, Lieutenant Howard, when the first interview occurred; what time?

A I cannot give you an exact time, no. But I believe it was probably two hours or so prior to my talking to him; an hour and a half, two hours; somewhere along there.

Q You indicated to Attorney Lyons that you read the card?

A Yes.

Q Is that card as a matter of course—withdrawn.

Do you request as a matter of course, after the reading of the card which has the Miranda rights thereon, do you normally request the subject to then sign the card?

A Yes. It is in the instance like if the tape recorder is going. I had a tape recorder going and I felt it was going to work properly. In this particular instance, it did not.

Q Is it required of you, Lieutenant Howard, that the accused sign the card?

MR. LYONS: I object to that, your Honor.

MR. SOLOMON: I think that is important, your Honor.

MR. LYONS: I don't think it is at all. I think that is a question for the Court to decide if it is important.

I think the officer has testified that he advised the defendant of his so-called rights. I don't know that the police department policy, one way or another, will affect the threshhold admissibility of the statement. I don't think it is a proper question.

THE COURT: What is your claim, counselor?

MR. SOLOMON: My claim, your Honor, is this: He has stated just a moment ago that he was relying on the recordation of this particular narrative by the accused to cement whatever went on there. Unfortunately, the device malfunctioned.

Lieutenant Howard said it was because of that reliance of the effective — depending on the effective recordation that he did not in this instance ask Mr. Barrett to sign the card.

THE COURT: I think you are taking that out of context.

He also said that he was aware at that time that the rights had previously been given and that the first card had been signed.

MR. SOLOMON: I know that. I was going to pursue that further, your Honor.

THE COURT: Whether or not at this stage of the case, he would deem it important that the card be signed, I think is irrelevant.

I will sustain the objection.

MR. SOLOMON: Let me have an exception, please.

THE COURT: It may be noted.

Q You have indicated you asked Mr. Barrett if he understood the contents or the context of what you read from the card?

A Yes, sir.

Q What was his reply to you?

A He did. He understood.

Q Was the card shown to him at any point during your interview?

A No. I read from the card.

Q You read from it?

A Yes, I did.

Q And you had prior knowledge that Mr. Barrett apparently had already executed one of those cards?

A Yes.

Q As recited to you by Officer Cameron?

A In the office, yes.

Q When did it come to light that the tape recorder malfunctioned?

A After he left the office I checked it. The wheels were turning but it did not record anything because of the malfunction in the receiver. And it was embarrassing.

Q Was that tape recorder subsequently sent out for repair?

A What happened, it was a loose wire and Sergeant Butka had taken care of it.

I don't know if Sergeant Butka tacked it on or if he took it to police headquarters to get some assistance. Occasionally, they do help us if an equipment malfunctions. I cannot answer specifically who fixed it. It had been — all it needed was the thing to be tacked.

Q It was subsequently repaired, however?

A Yes.

Q By the way, do you know of your own knowledge, Lieutenant Howard, if Mr. Barrett's attorney ever arrived at the Wallingford Police Department before he left to go to the hospital and then court?

A If he arrived, I am not aware of it. I am not aware of it.

Q You were involved in the transport process from the Wallingford Police Department to the hospital?

A No, I was not.

Q Could you please tell me who was?

MR. LYONS: I'm going to object, your Honor.

Irrelevant at this particular hearing.

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THE COURT: Where are we going from here with this?

MR. SOLOMON: Observations, your Honor, made by an officer during the transport process.

THE COURT: And your claim of relevance would be what?

MR. SOLOMON: If, in fact, inconsistencies developed as to the degree of the alleged facial injuries, then it goes to the weight and it will assist the Court in making a determination whether said injuries did or did not have an influence on the total picture of voluntariness.

THE COURT: I will allow the question.

A I don't know who took him. I cannot answer the question.

Q Would that be a matter of record?

A Who took him?

MR. LYONS: That is a fishing expedition. What does that have to do with his observations?

THE COURT: Now I think you are far afield. I will sustain the objection.

MR. SOLOMON: All right.

Q You did not accompany him to the hospital; is that correct? You did not, yourself, personally?

A No, I did not.

Q You did not accompany Mr. Barrett to court. Is that correct?

A No, I did not.

* * *

C. Transcript Of Judicial Ruling On Motion To Suppress Defendant William Barrett's Statements. (Tr. pp. 599–602)

* * *

As to Officer Cameron's testimony, which comes back now to the need of whether or not statements made to him or in his presence were voluntarily made after an intelligent waiver, I would indicate that the defendant, in fact, signed an initial rights form.

While that was being done, the Court concludes from the evidence it heard that he indicated he understood perfectly what was being read to him. Not only did he indicate that he understood, he offered the statements that he did not need anything explained to him because he understood. So it was not merely a passive acquiescence and his agreement that he understood, he did go on to explain that he did not need anything explained to him because he perfectly understood.

He then went on to indicate that he had no problem and those were his words, talking about the incident but he would not give a written statement until his attorney arrived which indicates to the Court that he certainly understood from having his rights read to him that it was not necessary and he was under no obligation to give any statement. He went on thereafter to sign another rights form after being again advised of his rights.

At this point we have testimony which the Court finds to be credible that in giving his own narration of the story that he at least on one occasion or perhaps more, ignored questions that were directed to him which is a further indication to the Court that he understood that that was his right, and he then was shown another rights card.

All of his rights were again read to him and he again indicated that he did not wish to give a written statement but agreed that he would talk about and furnished his own narration as to what happened.

I don't find that any force, any threats were used. I find that the statements were made by the defendant willingly, knowingly and intelligently after an effective knowledgeable waiver of his right to counsel at that point.

So the motion as it is directed to Officer Cameron's testimony is denied. And I think that brings us up to date.

* * *

THE COURT: It was the Court's intention to include statements made to Lieutenant Howard after he was shown the rights card, after he had already signed two and it again was read to him and he again at that time indicated that he had no problem in giving an oral statement but that he would not sign a written statement, all of which, again, indicated to the Court and I thought I made it clear, that he obviously understood he had that right and exercised it.

* * *

D. Transcript Of Testimony Of Officer Peter D. Cameron — Partial. (Tr. pp. 660-705 — Trial Testimony)

OFFICER PETER CAMERON, of the Wallingford Police Department, Wallingford, Connecticut, first having been duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION BY MR. LYONS:

Q Officer Cameron, for how long have you been employed by the Wallingford Police Department?

A Approximately six years.

Q And were you employed as a police officer for the Wallingford Police Department on October 24th of 1980?

A Yes, sir, I was.

Q And do you recall what shift you were working?

A The 11:00 to 7:00 shift.

Q 11:00 in the morning to 7:00 in the evening?

A Yes.

Q Now —

A I'm sorry; that is 11:00 at night till 7:00 in the morning.

Q Now, on the morning of October 24th of 1980, did you have occasion to have an individual by the name of William Barrett in your custody?

A Yes, sir, I did.

Q And where was that?

A The New Haven Police Department in the town of New Haven.

Q And then did you have occasion to transport that person to the Wallingford Police Department?

A Yes, I did.

Q And is that person present in this courtroom?

A Yes, he is.

Q Could you point him out for the Court and the jury?

A The gentleman seated at the defense table?

Q Seated right in front of where I am standing at this time?

A Yes, sir. That is correct.

MR. LYONS: May the record reflect he has identified the defendant?

THE COURT: The record may so indicate.

Q Now, in conjunction with having him in your custody at the Wallingford Police Department, did you have occasion to process him or book him, in police language?

A Yes, sir, I did.

Q And during the course of booking the defendant, did you have occasion to take personal data from him regarding his name, date of birth, et cetera?

A Yes, sir, I did.

Q And did you, in fact, ascertain his date of birth from him?

A Yes, sir, I did.

Q What was it?

A I believe it was 1/11/61.

Q And during the course of processing Mr. Barrett, did you have occasion to ask him what his educational level was?

A Yes, sir, I did.

Q What was it?

A That was the 12th grade.

Q And, again, at this time, did you have occasion to advise Mr. William Barrett of his so-called Miranda rights or his constitutional right to remain silent?

A Yes, sir, I did, as part of the normal booking procedure using a court-prepared form.

Q And did you, in fact, read from the court-prepared form?

A Yes, sir, I did.

Q And after you read it, did you do anything else with respect to it?

A I typed my name on it and had the defendant sign it as an indication that he had his rights given to him.

Q And did he, in fact, sign it in your presence?

A Yes, sir, he did.

Q And after that was signed in your presence, did you have occasion to forward it to the clerk of this court?

A Yes, sir, I did.

MR. LYONS: If the Court pleases, I would ask the Court to take judicial notice of what's in the Court's file.

I would have the officer give some preliminary identification testimony if the Court wishes. However, obviously, as it is the Court's file, I don't want to mark it as an exhibit. I don't think I can.

So am asking the Court to take judicial notice.

THE COURT: What is to be gained by the Court taking judicial notice of it?

MR. LYONS: So it becomes evidence for the jury to consider.

THE COURT: I don't know that I have to take judicial notice of it.

MR. LYONS: Then I will remove it to offer.

I would ask that this be marked for identification, your Honor.

THE COURT: It may be so marked.

(Whereupon, State's Exhibit V for identification was marked—rights form.)

Q Officer Cameron, showing you what has been marked as State's Exhibit V for identification, I will ask you to look at that document and tell me whether or not you recognize it?

A Yes, sir, I do.

Q And how do you recognize that?

A My name is on it. It is dated the 24th of October, 1980. The time is 6:12 and it is signed by the defendant at the bottom.

Q Was that signed by the defendant in your presence?

A Yes, sir, this is the court-prepared form I was referring to.

MR. LYONS: I would offer this as a full exhibit, your Honor.

MR. SOLOMON: I have no objection, your Honor.

THE COURT: It may be marked as a full exhibit.

(Whereupon, State's Exhibit V was admitted into evidence—rights form.)

MR. LYONS: May I just pass it briefly to the jury?

THE COURT: You may.

(Whereupon, the form was passed to the jury.)

Q Officer, now after that notice of rights form was signed by the defendant, did you have occasion to conduct an interview with the defendant with another officer?

A Yes, sir, I did.

Q And who was that other officer?

A There were two other officers in two separate interviews. The first being Sergeant John Genovese; the second being Lieutenant Howard.

Q With respect to the first interview, before that actually commenced, was there anything done by either you or Sergeant Genovese with respect to advising the defendant of his so-called Miranda rights?

A Yes, sir.

Q What was done?

A Sergeant Genovese read—

MR. SOLOMON: Your Honor, I am going to object on the basis that anything pertaining to Sergeant Genovese, unless he is going to be produced as a witness, your Honor, should not be forthcoming from Officer Cameron.

THE COURT: Well, I would certainly agree if it is in the nature of something Sergeant Genovese may have said.

MR. SOLOMON: Maybe my objection is preliminary.

I will withdraw my objection at this point, your Honor.

THE COURT: Thank you.

Q And was something—Well, perhaps, the question could be read back.

(Whereupon, the question was read back by the court reporter.)

A Yes, sir.

Q And was anything used to assist you or Sergeant Genovese in advising the defendant of his so-called Miranda rights?

A Yes, sir. A small wallet-sized copy of those so-called warnings; rights.

MR. LYONS: I would ask that this be marked as an exhibit for identification.

THE COURT: It may be so marked.

(Whereupon, State's Exhibit W for identification was marked—rights card.)

Q And showing you what has been marked as State's Exhibit W for identification, Officer Cameron, do you recognize that?

A Yes, sir, I do.

Q And how do you recognize it?

A My signature is on it.

Q Is there any other writing on there?

A Yes, sir. Sergeant Genovese also signed it.

Q Are you familiar with his handwriting?

A Yes, sir, I am.

Q Is that his handwriting?

A Yes, it is.

Q Was that typed in your presence?

A Yes, it was.

Q Is there any other writing on there?

A The time, 0630. It is dated 10/24/80 and it is signed by the defendant on the bottom.

Q Was that signed by the defendant in your presence?

A Yes, sir, it was.

MR. LYONS: At this point, I will offer it before I ask any questions with respect to it, your Honor.

MR. SOLOMON: No objection, your Honor.

THE COURT: It may be marked as a full exhibit.

(Whereupon, State's Exhibit W was admitted into evidence—rights card.)

MR. LYONS: With the Court's permission, I would like to pass this to the jury.

(Whereupon the document was passed to the jury.)

Q Now, Officer Cameron, where was this second advisement of rights done in the Wallingford Police Department?

A On the second floor in the Detective Division.

Q And was it done in a particular room?

A Yes, sir; the actual advisement of rights was done in the Detective Bureau.

Q And who was present in the room?

A Myself and Sergeant Genovese and the defendant.

Q Now, could you describe the defendant's physical appearance as best as you recall at that particular time?

A Somewhat disheveled; the clothes he was wearing. I believe it was his right hand, he had a small gash on the back of it. It was swollen somewhat. There also was a slight mouse or laceration bruise under one of his eye on his face. I don't recall on which eye or which side of the face that was.

MR. LYONS: I would ask that these be marked for identification.

MR. LYONS: I would ask that these be marked for identification.

THE COURT: They may be marked.

(Whereupon, State's Exhibit X, Y and Z were marked for identification.)

Q Showing you what has been marked as State's Exhibits for identification, X, Y and Z, could you look at those and tell me whether or not you recognize those, Officer Cameron; just yes or no?

A Two of them I do for sure. The other one I can't be positive about.

Q Would you look at both sides; which do you recognize for sure and the other one you cannot be positive?

A Z and Y are pictures of the defendant taken of the defendant at the time of his arrest as we were transporting him from New Haven to Wallingford Police Department.

Q And does it fairly and accurately depict what the defendant looked like on the morning of October 24th of 1980 at approximately 6:30 in the morning?

A Yes, sir.

MR. LYONS: I would offer these as full exhibits, your Honor.

MR. SOLOMON: May I inquire, your Honor?

THE COURT: You may.

MR. SOLOMON: Thank you.

VOIR DIRE EXAMINATION BY MR. SOLOMON:

Q Officer Cameron, where were these photos taken?

A By the look of the back, I would say in the downstairs booking room but I cannot be positive. It was downstairs.

Q Your department; Wallingford Police Department.

A Yes, sir. Wallingford Police Department.

Q Was this done when Mr. Barrett was first brought to the Wallingford police station?

A Yes, sir.

Q Did you take these photos or did Sergeant Genovese?

A I have no knowledge of who took them. I was only made aware that they were taken.

Sergeant Genovese informed me that, in fact, he did take pictures with a 35 millimeter camera but I was not present when he took them.

Q Did you see these photographs prior to this day?

A No, I have not.

Q But your recollection is this is a fair and accurate representation of the defendant based on your recollection when he was processed at the Wallingford police station?

A Yes, sir.

MR. SOLOMON: No objection, your Honor.

THE COURT: They may be marked as full exhibits.

(Whereupon, State's Exhibits Y and Z were admitted into evidence—photographs.)

Q Again, Officer, with respect to State's Exhibit X for identification, I would ask you again with respect to that alone, whether you recognize it or not?

A I recognize the handwriting on the back which states the hand of William Barrett taken on 10/24 by Sergeant Genovese with regard to this case.

One of the hands has a slight gash and swelling on the back as I remember the defendant.

Q Does that photo, to the best of your recollection, fairly and accurately depict his hand as you recall it?

A Yes, sir.

Q And as you testified to previously?

A Yes, sir.

MR. LYONS: I would offer it, your Honor.

VOIR DIRE EXAMINATION BY MR. SOLOMON:

Q When Attorney Lyons first addressed this photograph, called it to your attention, Officer Cameron, you indicated as far as recognition, that you could not be sure?

A That is correct, sir.

Q What is it you are telling us now that you recall that the hands reflected in this photograph, were as you remembered them on October 24, 1980?

A That is correct, sir.

Q Does the photograph in and of itself refresh your recollection as to the condition of his hands on that date?

A Yes, sir, it does. Having in respect to the gash and swelling.

Q And you did not take these pictures; it was Genovese. And, again, this was taken at the Wallingford police station?

A I really cannot answer that. It says it was. Therefore, I assume it was but I was not present when it was taken.

Q Have you seen this photograph before today's date?

A No, sir, I have not.

MR. SOLOMON: No objection.

THE COURT: It may be marked as a full exhibit.

(Whereupon, State's Exhibit X was admitted into evidence—photograph.)

MR. LYONS: May I pass these to the jury, your Honor?

(Whereupon, the photographs were passed to the jury.)

Q Now, Officer, have you ever dealt with people who are obviously under the influence of alcohol or narcotic substances?

A Yes, sir.

Q And did the defendant appear to be intoxicated by either alcohol or drugs on the morning of October 24th of 1980 at approximately 6:00 or 6:30?

A No, sir he did not.

Q And did he appear to understand your questions with regard to his constitutional rights?

A Yes, sir.

Q And was his speech coherent?

A Yes, sir.

Q And did he ever invoke his right to remain silent?

A No, sir, he did not.

Q Did you coerce him into making any statements with threat of bodily actions of any type?

A No, sir, I did not.

Q Did anyone in your presence coerce him into doing it?

A No, sir.

Q Did you or anybody else that you are aware of promise him anything in return for a statement?

A No, sir.

Q Did he, in fact, agree to answer questions and make a statement at some point?

A Yes, sir, he did.

Q And did he say anything with respect to whether he wanted his attorney present or not?

A He indicated to me in the original booking in the basement of the police station that he would not give a written statement unless his attorney was present, however, he would talk verbally about the incident.

Q And the second time after he was advised of his rights before the statement was actually taken, did he indicate anything with respect to whether or not he wanted his attorney present?

A No, sir, he did not.

Q And did he, in fact, make a statement in response to your questions and Sergeant Genovese's questions?

A Yes, sir, he did.

Q And to the best of your knowledge, was it freely and voluntarily given?

A Yes, sir.

Q And at any point during the course of the statement, did he refuse to answer any questions or simply say, "I want to stop; I don't want to go any further"?

A No, sir, he did not.

Q Could you please relate to the ladies and gentlemen of the jury what he told you that morning of October 24th of 1980, at approximately 6:30?

A Yes, sir. He told Sergeant Genovese and me that he had been in New Haven, the city of New Haven, approximately eight o'clock that evening with another friend. They were in his car driving around.

Q Did he say who that other fellow was?

A I believe the name given was Artis Newton.

They were driving around the city of New Haven. They saw a young lady standing on a street corner who one of them knew. I don't recall exactly what he said in regard to who knew her. That they stopped and asked her if she wanted a ride and she indicated that they could drop her off at a certain street in New Haven.

She got in the car. They drove by that street, made one stop for gas and got onto Route I-91 northbound. They drove up Interstate Route 91 northbound to Exit 14 in the town of Wallingford which is the Woodhouse Avenue exit. They exited.

Q Did he actually name that exit by name?

A I don't recall for sure. I believe he knew it was Woodhouse Avenue. I don't believe he knew exactly what exit it was.

That they exited at Woodhouse Avenue. That they proceeded what would be away from the town on Woodhouse Avenue to a road that he named as Tyler Mill Road. That once on Tyler Mill Road, they drove northbound up Tyler Mill Road from Woodhouse Avenue a short distance; parked the vehicle and at that point in his own words, they began hugging the young lady.

Q Officer, before he said that, did he indicate to you where they were respectively in the car before that so-called hugging began?

A On the drive to Wallingford from New Haven, I don't believe he ever did.

Q I am talking about once the car was on Tyler Mill Road, Officer.

A I believe he stated that they were both in the back seat hugging the young lady.

Then the story — his version of the story became a little confused. He stated at one point —

Q Let me bring you back a minute.

At the point that he stated that they began hugging Miss Jones, did he say anything with respect, as best you can recall, as to what she was doing at this time?

A Yes, sir. He said that she struggled or resisted the efforts of hugging her for approximately 20 minutes.

After that time, and again the exact sequence was somewhat confused at one point, he hopped over the seat back into the front seat. He reached down on the floor, the front seat of the car, and picked up a Phillips screwdriver at which point he held it up to the young lady's face and told he if she did not want cooperate, then she could get out of the car.

Q Did he say anything that she did at that point or said, if you recall?

A I don't recall offhand. After that point, or some point thereafter, and again it was somehwat out of sequence, that at one point she scratched the back of one of his hands and he slapped her on the back of the head.

That ultimately, himself and the other person in the car, Mr. Newton, had what he described as regular sexual intercourse, approximately three times with this young lady.

At some point he remembered that the young lady had exited the vehicle without any pants or underwear on and gone to the bathroom outside of the car.

He estimated that about eleven o'clock they went back; headed back to New Haven where they dropped this young lady off.

Q Now, when that interview was conducted, Officer Cameron, again, who was present at that particular time?

A Myself, Sergeant Genovese and the defendant.

Q Now, did you attempt to tape-record that segment?

A Yes, sir.

Q And what was the results of your efforts to tape-record it?

A There was a malfunction with the tape recorder. No recording was ever made. The tape recorder appeared to be working, however, it did not record.

Q Now, did you take part in the taking of a second statement or a second interview with the defendant later that morning?

A Yes, sir, I did.

Q And why was that done?

A It was an attempt to again record the defendant telling his side of the story, his version of the story, what had transpired the previous evening.

Q And where was that done?

A In Lieutenant Howard's office. The head of the Detective Division, in the Detective Division of the Wallingford police station.

Q And who was it done by?

A It was done by Lieutenant Howard and myself.

Q Sergeant Genovese was no longer there?

A He was no longer there.

Q On this occasion, was the defendant advised of his so-called Miranda rights again?

A Yes, sir.

Q And a second statement was taken?

A Yes, sir.

Q And was an attempt made to tape-record that statement?

A Yes, sir; using the same tape recorder.

Q What were the results of your efforts?

A The same as the first; evidently, there was something malfunctioning with the pickup device, the microphone and even thought it appeared to be working, no recording was ever made.

Q You stayed during the duration of the second interview?

A Yes, sir.

Q And subsequently you prepared a report summarizing the interviews?

A Yes, sir.

Q And was that report a summary of what you heard at both interviews?

A Yes, sir.

Q And, incidentally, when did you prepare your report in this case?

A Approximately one hour after the second interview that same morning.

Q And then who did you give your report to?

A At that point, I turned it over to the main investigating detective.

Q Who would that be?

A Detective Ginorio.

Q That would be on the 24th at what time in the morning?

A I would estimate around nine o'clock.

Q Showing you this three-page report, is that the report that you prepared in conjunction with your investigation of this case?

A Yes, sir. It is.

Q And is that the only report that you prepared?

A Yes, sir.

MR. LYONS: May the record reflect I am giving defense counsel a copy of the complete report?

THE COURT: The record may so reflect and we will take a short recess to give him an opportunity to digest it.

(Whereupon, there was a short recess.)

(Whereupon, court was back in session.)

THE COURT: Bring the jury in, please.

(Whereupon, the jury entered the courtroom.)

MR. LYONS: The State will stipulate to the presence of the jury, your Honor.

MR. SOLOMON: I will also, your Honor.

MR. LYONS: I have no further questions of Officer Cameron.

CROSS-EXAMINATION BY MR. SOLOMON:

Q Good morning, Officer Cameron.

A Good morning.

Q Officer Cameron, you prepared your report in this case on October 24th of 1980; is that correct?

A Yes, sir, it is.

Q And have you had an opportunity since that day to review your report?

A Yes, sir.

Q And when was that, sir?

A Several times. The latest, this morning.

Q This morning?

A Yes, sir.

Q This several times that you have alluded to, was this in preparation for your testimony?

A Yes, sir.

Q Your recitation of what the complainant — strike that. Withdrawn.

Your recitation of what Mr. Barrett told you, is that spelled out in your report?

A Yes, sir. I believe it basically is.

Q Are there any differences?

A I don't believe so. I don't recall any.

Q By the way, Officer Cameron, did you bring with you this morning in response to a subpoena that I have served on the Wallingford Police Department, copies of mug shots of William H. Barrett?

A Yes, sir.

Q Do you have them with you?

A Yes, sir.

Q May I see them, please?

(Whereupon, an envelope was handed to the attorney.)

MR. SOLOMON: Thank you.

Q Officer Cameron, did you have the benefit of any of the reports furnished your department before you interviewed William H. Barrett?

A I don't understand which other reports.

Q For example, the report prepared by Officer Illingworth of the New Haven Police Department?

A No, sir. I never saw it.

Q Did you see any of the reports prepared by any of the officers in the New Haven Police Department—

A No, sir.

Q —relating to this case?

A No, sir.

Q So, in essence, your report in this matter, Officer Cameron, summarized your involvement from the point of pickup of Mr. Barrett in New Haven, transport to Wallingford, and the subsequent booking and taking of two statements or interviewing him on two occasions?

A Yes, sir.

Q Was there any conference involving you and Detective Ginorio prior to the taking of either interviews in this matter?

A No, sir; there was not.

Q So your questioning or the narrative as supplied by Mr. Barrett, was done independent of any additional information that may have been available to your department?

A Yes, sir.

Q May I ask you this, Officer Cameron; the rights form that is supplied by the court and subsequently furnished by the court, the execution of that form, was that done downstairs in the booking area of the Wallingford Police Department?

A Yes, sir.

Q And was that done shortly after Mr. Barrett arrived at the Wallingford Police Department?

A Yes, sir.

Q And you were involved in the rights on that first form, the execution of that?

A Yes, sir.

Q Was any other officer present with you at that time?

A No, sir. There was not.

Q When was the smaller rights card executed? Was it done about the same time or was it done later upstairs on the second floor?

A It was done some time later on the second floor in the Detective Division.

Q Prior to the first commencement of the first interview?

A Yes.

Q Was anyone present with you at that time in the execution of that rights card?

A Yes, sir. Sergeant Genovese.

Q As a matter of course—withdrawn.

Was the terminology on the rights form, itself, read to Mr. Barrett prior to him signing same?

A Yes, sir, it was.

Q And do you recall, Officer Cameron, who read the terminology off the rights card?

A Sergeant Genovese did.

Q Were you present at the time of the reading of those rights?

A Yes, sir, I was.

Q Was this taking place in Lieutenant Howard's office at the police station?

A I believe the reading of the rights took place right outside the door of the Detective Division.

Q If you go out of Lieutenant Howard's office door, where do you end up?

A In the larger room known as the Detective Division.

Q Were there other officers present in this larger room at that time, if you can recall?

A I don't recall.

Q Where did the actual signing of the rights card take place; inside Lieutenant Howard's office or was it done outside in the larger area?

A It was done immediately after reading the rights card; right where we were in the Detective Division.

Q Was there a desk or something available to you to utilize?

A I believe so.

Q How many detectives are there in the Wallingford Police Department, if you know?

A I believe 11.

Q And this was an 11:00 to 7:00 shift that we are talking about?

A Yes, sir.

Q It was prior—it was about 6:30, I think you indicated that the first interview commenced?

A Yes, sir.

Q Would there have been other detectives on duty at that time?

A No, sir, there were not

Q Who would have been on duty at 11:00 to 7:00 in the Detective Bureau?

A No one.

Q No one?

A They have no one working the first shift or the third shift, whatever; the 11:00 to 7:00 shift.

Q I see. Is Sergeant Genovese assigned to the Detective Bureau?

A No, sir, he is not.

Q Did there come a time when you were closeted in Lieutenant Howard's office with the defendant, William H. Barrett?

A Yes, sir.

Q Was this shortly after the execution of the rights card?

A Immediately after.

Q Okay. Could you describe his office for me, please?

A That's quite small. It has got a single desk in it with a normal file, in and out baskets, et cetera. There is a small book shelf behind it with cases, books, et cetera, and various materials piled up on a ledge by a window.

There is a window facing outside. The room is approximately, to the best of my recollection, approximately, I would say about 11 by 15, if that. It may be smaller than that.

Q I see. When was it that you asked — I believe you mentioned it on two occasions — and please correct me if — when was it that you asked Mr. Barrett if he wished to make a written statement?

A After the original execution of the court-prepared rights form. At the booking procedure, I inquired of him if he wished to talk to the police to make a written statement, et cetera. And he indicated that he would not make a written statement until his lawyer was there but he would talk to us about the incident.

Q That was when he was first there. That was downstairs?

A Yes.

Q You were present when he said that?

A Yes, sir.

Q He said it to you, as a matter of fact?

A Yes, sir. I was the only one present.

Q Did there come another time, Officer Cameron, that you inquired of Mr. Barrett whether he wished to make a written statement?

A I didn't but others present did.

Q Could you say where that happened?

A At both interviews. Sergeant Genovese at the first and Lieutenant Howard at the second inquired whether or not he had changed his mind.

Q And wished to make a written statement?

A And wished to make a written statement.

Q And what was his response on both occasions?

A Again, in order for him to make a written statement, he wanted his attorney present.

Q Do you know of your own knowledge, Officer Cameron, if Mr. Barrett had an opportunity to use the telephone?

A Yes, sir; during the booking procedure, he made several telephone calls.

Q Several?

A Yes, sir.

Q Were you present when the telephone calls were made?

A I was in the same room but I did not hear who he was calling or what was said.

Q Do you know if he reached an attorney or not?

A I had no idea.

Q Did he indicate to you if he had reached an attorney?

A No, sir.

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Q Was it made known to Mr. Barrett during or before the first interview, before the commencement of same, that your department was recording the interview?

A No, sir.

Q And as applies to interview Number 2, was it made known to Mr. Barrett that that subsequent interview was being recorded by the Wallingford Police Department?

A No, sir.

Q Both attempts at recordation by the Wallingford Police Department were unsuccessful; is that correct?

A That is correct.

Q So is it not a fair statement, or a fair question, Officer Cameron, to ask you that your report in this matter contains your recollection of what was said to you by the defendant, William H. Barrett, on two occasions, at both interviews?

A Basically, yes, sir.

Q In essence, is it not a summary, your summary of what Mr. Barrett said to you during the course of the two interviews?

A Yes, sir, it is.

Q Are there points mentioned to you by the defendant, William H. Barrett, at either interview that are not contained within your written summary of what he said?

A There very well might be. And after reviewing my report, I do remember one or two slight variations of other facts or things that were said.

Q But they are not contained in your written report; is that correct, Officer?

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A That is correct.

Q Am I to assume, Officer Cameron, that your narrative summary of what William H. Barrett stated to you — and you were present during both interviews; is that correct?

A Yes, sir.

Q Does your narrative summary reflect what was said by Mr. Barrett at both interviews?

A Yes, sir.

MR. LYONS: I am going to object, your Honor. It has been asked and answered. I don't know how many ways it can be asked.

THE COURT: I believe it has.

I will sustain the objection.

MR. SOLOMON: It was answered, anyway, your Honor.

Q The points that you recall, the slight variations that were not included in your narrative summary, did those come from interview Number 1 or interview Number 2, if you can remember?

A I cannot say for certain which interview they actually came from.

Q May I ask this, please, Officer Cameron; during the first interview, were you directing questions to Mr. Barrett?

A Some questions.

Q Was Officer Genovese directing questions to Mr. Barrett?

A Again, some questions.

Q And was Mr. Barrett responding to your questions?

A On occasion, he would. On occasion, he would just continue with what he was saying and more or less ignore the question.

Q Were the purpo of the questions more for clarification than anything else in your judgment?

A As best I remember, yes, sir, they were.

Q Was Mr. Barrett giving you essentially a narrative of what had transpired?

A Yes, sir.

Q And did there come a time during the course of the narrative that either you or Sergeant Genovese would interrupt his narrative and ask a question?

A I don't recall specific occasions.

Q But you do recall asking some questions?

A Yes, sir.

Q And Sergeant Genovese asked some questions?

A Yes, sir.

Q During the first interview, did you and/or Sergeant Genovese take notes?

A I did not, sir. I cannot say whether Sergeant Genovese did or not.

Q You were in the same room with him; is that correct?

A Yes, sir.

Q Is it your practice during an interview to take notes, Officer Cameron?

A Generally; however, in this case, the tape recorder was—we thought it was recording the entire incident, thus negating the need for any written notes.

Q I see. And that would apply to interview Number 2 also is that correct?

A Yes, sir.

Q Officer Cameron, how much time elapsed if you can recall, between interview Number 1 and interview Number 2?

A I cannot say exactly. I would approximate an hour.

Q About an hour?

A Maybe less.

Q Were both interviews conducted in the same place?

A Yes, sir.

Q Lieutenant Howard's office?

A Correct, sir.

Q Did the format—was the format of interview Number 1 followed at the second session with you and Howard present?

A Yes, sir, it was.

Q Basically, a narrative by the defendant, William H. Barrett?

A Yes, sir.

Q With the interjection of some questions by you and were there some questions also by Lieutenant Howard?

A Yes, sir.

Q Were there some questions posed by you and Lieutenant Howard?

A The ones that I remember, there were, sir, yes.

Q Were those questions asked primarily for the purpose of clarification, Officer Cameron?

A Most were, yes, sir.

Q Did you have any advance knowledge of what had transpired prior to either interview?

A No, sir.

Q So your questioning then, Officer Cameron, was strictly on the basis of the narrative as being told you then by Mr. Barrett?

A Yes, sir.

Q And your attempt to clarify certain points?

A Yes, sir.

Q Officer Cameron, do you recall testifying, I believe, it was a prior day?

A Yes, I do.

Q And that was at the suppression hearing, is that correct?

A Yes, sir.

Q Do you remember, Officer Cameron, my asking you a question regarding the physical condition of the defendant, William H. Barrett?

A Yes, sir.

Q And do you remember your answers to my questions, sir?

A I recall describing the physical condition or any physical appearance of the accused at the time of booking, yes, sir.

Q And do you remember what you told me in response to my questions, Officer Cameron, as to Mr. Barrett's physical condition when you first observed him?

A Basically; not exactly.

Q Do you remember telling me, Officer Cameron, anything about the condition of his eye?

A I believe you asked me a question if there was anything wrong with his face. Did I notice anything wrong with his face. I did not recall that.

Q Earlier in response to Attorney Lyons' questions, do you recall indicating, Officer Cameron, that there was a slight mouse under his eye; you are not sure which eye it was?

A That is correct, sir.

Q Did Mr. Barrett appear nervous and upset when he was talking to you?

A He was upset over the fact that he had been arrested, yes, sir.

Q Officer Cameron, I show you the mug shots that you brought to court this morning in response to my subpoena and ask you if those were the mug shots taken of the defendant, William H. Barrett, in the early morning hours of October 24, 1980?

A Yes, sir, they were.

Q And were those mug shots, Officer, kept in a file at the Wallingford Police Department?

A Yes, they were.

Q And to your knowledge, had they been disturbed or not removed until this morning that you brought them to court?

A I would have no knowledge of that.

Q Were these the only mug shots taken of the defendant that you are aware of?

A They were the only pictures taken of the defendant that I was aware of.

Q We also have some other photos that have been introduced. They were taken also, right?

A Yes, sir. At the time, until today in court, I had not seen them.

Q You had not seen the others?

A No, sir.

Q Do these photographs or mug shots as they are commonly known, Officer Cameron, reflect accurately the condition of Mr. Barrett's face in the early morning hours of October 24, 1980?

A Yes, sir, they do.

Q Thank you.

MR. SOLOMON: I offer this, your Honor.

MR. LYONS: No objection.

THE COURT: It may be marked; Defendant's Exhibit 1—photograph.

(Whereupon, Defendant's Exhibit 1 was admitted into evidence—photograph.)

MR. SOLOMON: May I pass it among the jury, your Honor?

THE COURT: After I have seen it.

MR. SOLOMON: Sure.

(Whereupon, the photograph was handed to the Court.)

(Whereupon, the photograph was passed to the jury.)

Q Officer, were those photos taken during the normal process and booking of Mr. Barrett at the Wallingford Police Department?

A Yes, sir, they were.

Q Let me ask you this, Officer; did Mr. Barrett ever inquire of you, of you I am talking about now, that he would like someone to take a look at his eye or his face?

A I don't recall him ever making that request.

Q Did he ask you that he would like a doctor or someone to take a look at him?

A No, sir.

Q Were you aware of the condition of his face as represented in those photographs during the course of your questioning?

A Yes, sir.

Q Did there come a time to your knowledge, Officer Cameron, that medical attention was provided Mr. Barrett?

A Yes, sir. At one point, they were transported to a local hospital; both Mr. Barrett and the codefendant, and examined in the emergency room.

Q What hospital was that?

A World War II Veterans Memorial Hospital in Meriden.

Q Did that occur, Officer Cameron, after the completion of the interviews at the Wallingford Police Department?

A I don't recall the exact time in between the two interviews or if it was after the interviews. I don't recall the exact time that they were taken to the hospital.

Q You then, I assume, were not involved in the transport of Artis and/or Barrett to the hospital?

A Yes, I was.

Q You, personally, took them?

A I believe I was accompanied by another officer. That would be standard procedure but I don't recall who that was.

Q But you don't recall, Officer Cameron, if that occurred after the second interview with you and Howard or in between?

A I cannot say for sure.

Q Were you present when Mr. Barrett was examined at the World War II Veterans Memorial Hospital?

A Yes, sir.

Q Where was that done; in the emergency room?

A Yes.

Q As a result of that examination of Mr. Barrett at the hospital, did you become aware of any particular findings regarding his condition?

MR. LYONS: I will object, your Honor. I will not object to his question; I will object to the next question.

THE COURT: You may answer the question.

A No, sir. I really don't recall anything specific with regard to it.

Q Was a medical report ever furnished your department regarding his condition?

A To my knowledge, no.

Q Was one sought by your department.

A To my knowledge, again, no.

Q Officer Cameron, in response to Attorney Lyons' questions, and asking you to recite what was said to you by the essence of what Mr. Barrett said to you during the two

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interviews, the recitation in your testimony was that a complete recitation of what was said?

A No. It was basically a summary of what was said.

Q Is your in-court testimony the same then that would have been contained in your report that was written up shortly after this?

A I believe so. Yes, sir.

Q And you have already indicated that you have had an opportunity to review your report?

A Yes, sir.

Q Was there any mention made by Defendant Barrett during his interview, and I am bringing you back to the evening of October 23, 1980, Officer Cameron, was there any mention made of his stop in a package store?

A I recall somewhere along the line that being mentioned. By whom and at what time, I don't recall.

Q Okay. Then I am compelled to ask you this. Do you recall it being stated to you by Mr. Barrett at either interview?

A Again, I don't recall who stated it specifically.

Q Would it have been included in your report of the mention of the package store?

A I don't believe it was, no.

Q You indicated you might have heard it from someone else; is that correct?

A At some point in time with my dealings with the case; I really don't recall when or by whom.

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Q Officer, Mr. Lyons asked you if Mr. Barrett had indicated the exit that was taken as the vehicle left I-91 and I believe you said it was stated to be Woodhouse Avenue.

A That is correct.

Q Was there an exit number given you?

A I don't recall if Mr. Barrett actually gave me the number of the exit. I know that he stated it was Woodhouse Avenue.

Q If he had given you the number of the exit, would you have included it in your narrative summary?

A I most likely would have, sir.

Q Do you recall the length of the respective interviews; the first one involving you and Genovese and Barrett and the second one involving you, Howard and Barrett; the length of each one?

Let's take the first one, if you like, Officer Cameron.

A I will approximate 30 minutes. Again, if the tape recorder did come out, the starting time was announced on the tape and the ending time was announced.

Q That would have told us?

A I would approximate 30 minutes.

Q Would it be fair to say, Officer Cameron, that your recitation of what Mr. Barrett said to you and Genovese at interview Number 1 here in court moments ago lasted approximately five minutes?

A Yes, sir.

Q How long did interview Number 2 take?

A Somewhat shorter than interview Number 1. Anywhere from, I would say, it could have gone between 20 and 30 minutes.

Q And your recitation in earlier testimony this morning, was your summary of what Mr. Barrett said at both interviews?

A Yes, sir.

Q Did Mr. Barrett during the course of either interview, if you can recall, Officer Cameron, go into any details as to what happened in the vehicle on the night in question, October 23, 1980, in Wallingford?

A As far as I stated already, he went into that much detail; perhaps a little more in repeating some things. But as I summarized before, that much detail.

Q Does your narrative summary reflect the details as given to you by Mr. Barrett at either or both interviews or is it somewhat less detailed?

A It does not contain his actual words; each exact sentence or the thought of each sentence is a generalization of what happened; what he said in both interviews.

Q If you use a quotation, if you are quoting from Mr. Barrett in writing up your narrative summary, do you normally enclose those words in quotation marks?

A I would, as a habit, normally. Whether I did in this case or not, I cannot recall, specifically.

Q What I am asking you as opposed to your own terminology—

Q What I am asking you as opposed to your own terminology—

A Yes, sir.

Q —Officer Cameron, would your report, Officer, tell us when the subjects were transported to the hospital?

A I believe it does state in there, if I recall, that after the culmination of the interviews, I believe, I cannot recall specifically; I am trying to recall exactly what it says.

Q Would taking a look at your report help you recall?

A Most definitely.

(Whereupon, the report was handed to the officer.)

A Yes, it does.

Q After looking at your report, are you able to recall, Officer Cameron?

A Yes, sir.

Q And what is your recollection?

A After speaking with the officers, they were taken to the hospital.

Q Would I take it to mean after the second interview was concluded that the transportation to the hospital took place?

A I would assume after looking at my report, yes, sir.

* * *

E. Transcript Of Testimony Of The Defendant William Barrett—Partial. (Tr. pp. 855–889)

Q Did there come a time, Mr. Barrett, that you left the New Haven Police Department?

A Yes.

Q And under what circumstances did you leave?

A Like Ginorio, the lady cop and the tall guy, I am not sure of his name, but they had came and they had said that they were charging us with felony and if we tried to run that he would shoot us and they were taking us to Wallingford.

Q Excuse me. May I have that read back, please?

THE COURT: You did not understand the answer?

MR. SOLOMON: I did not hear it, your Honor.

(Whereupon, the answer was read back by the court reporter.)

Q And were you transported to Wallingford, Mr. Barrett?

A Yes. But before we went to Wallingford Police Department, we had stopped at Whalley Avenue and they had got these other clothes like blue clothes for us.

Q A stop was made at Whalley Avenue?

A Yes. To pick up some clothes, yes.

Q And did there come a time that you arrived at the Wallingford Police Department?

A Yes.

Q And do you have any idea, Mr. Barrett, what time it was that you arrived at the Wallingford Police Department?

A It was -- I would say it was early in the morning. I am not sure of the time, no.

Q How were you feeling about the time that you arrived at the Wallingford police station?

A I still felt the same. Like things were blurry and my eyes were bothering me.

Q Did you call the condition of your eyes to the attention of the Wallingford police officers?

A Yes, I did.

Q Were you offered medical attention upon arrival at the Wallingford police station?

A No. They did not offer to us.

Q What was the first thing that happened to you, Mr. Barrett, after arriving at the Wallingford police station?

A Like, I don't know, he had a mustache; he was a big cop. He had told me to stand up against the wall and he wanted to take some pictures of me.

Q Was it then that some pictures were taken of you?

A Yes.

Q Were these the mug shots that have been introduced into evidence?

A No. These were like I still had my other clothes on. This was when we had first really gotten inside the place.

Q Were these the full-length photographs that have been introduced into evidence?

A Yes.

Q I see. And what happened after that, Mr. Barrett?

A And then like they made us sit downstairs and take off our clothes and put on the blue clothes that they had got from Whalley Avenue for us.

Q And was that done?

A Yes.

Q Where were you at this point in time within the police station?

A In the basement as far as I remember. I am not sure what they call that because—but it was in the basement of the police station.

Q Had you been—withdrawn.

What happened after the transfer of the clothing?

A Then like he took me in like this other room and like told me to put my hands in some ink or something.

Q Yes? Were you fingerprinted?

A Fingerprinted. And then press my hand on the paper and then he took my pictures.

Q Were those the mug shots?

A Yes.

Q That have been introduced into evidence?

A Yes.

Q And after that procedure of the fingerprinting and mug shots, Mr. Barrett, what happened next?

A And we came back in the room and, I don't know his name, but the big cop again, like brought me these two papers over to this desk where I was sitting and told me to sign these. These were like something, my writings or something like that.

Q And did you sign them?

A Yes, I did.

Q Did you sign a longer form first?

A Like I signed the longer form and then I signed the card; but all like at the same time.

Q It was done at the same time?

A Yes.

Q And who was present during that, if you know, Mr. Barrett?

A The big cop again, I don't know his name, and the cop that went, the skinny cop that took us to the hospital and Robert Artis and this younger white dude about maybe 16.

Q And was this still in the basement area as you described it of the Wallingford police station?

A Yes.

Q And after the signing of these two pieces of paper, what happened next, Mr. Barrett?

A And then like he had said, like I could make a telephone call.

I had asked him before and he told me to wait. At that time I called my mother and I told her where I was and what happened and stuff.

Q Did you talk to anyone else on the telephone that evening?

A No, I did not.

Q Did you talk to an attorney that evening?

A No, I did not.

Q Did you have an attorney?

A No, I never had an attorney.

Q Did they—withdrawn.

Did you talk to your mother on the telephone?

A Yes.

Q And did you tell her what happened?

A Yes. Like I really did not get a chance to talk to her that long. Because, again, the big cop had told me to hurry up. For what reason, I don't know.

Q And after the phone conversation with your mom, what happened next, Mr. Barrett?

A And then the skinny cop, again, I cannot remember his name right now, but he had came downstairs and told me to come upstairs with him.

Q And did you go upstairs with him?

A Yes.

Q Was Mr. Artis with you at this time?

A No. He was still downstairs. I guess around that time he was calling his mother.

Q And when you got upstairs, Mr. Barrett, where were you taken?

A To—I don't know. It is like to this room. All I know it is like, it was like about this size. Maybe this size from there to there, and it had a lot of desks in it.

Q A lot of desks?

A Yes.

Q And what happened when you got into that area?

A And then like he told me like did I want to tell him what happened and I started telling him like the story like I have just told you.

Q Who was present as you were telling your story, Mr. Barrett?

A Just me and Officer—the tall guy—I cannot remember his name. But it was just me and the guy that brought us back from New Haven.

Q Was anyone else present to your recollection?

A No. Nobody else was in the room.

Q Would you describe it as an office at this time?

A It was more like—it was just, I would not say an office; I would say a room like, more like a room than an office.

Q I see. Before you started to give your story to this officer, did they ask you, Mr. Barrett, if you wanted to make a written statement?

A No. They did not.

Q They did not?

A No.

Q You have heard testimony, Mr. Barrett, in this court that Officer Cameron indicated that he had asked you if you cared to make a written statement.

MR. LYONS: If the Court pleases, I am going to object. That is counsel's recollection of the testimony and now he is testifying. I object to the form of the question.

THE COURT: I will sustain the objection.

MR. SOLOMON: I will withdraw it, your Honor.

Q So you then told Officer—you don't remember the officer's name—some officer—it was the officer that brought you back from New Haven to the Wallingford Police Department?

A Yes.

Q All right. You then told the officer your story?

A Yes.

Q Is that correct?

A Yes, I did.

Q And did you—the story that you indicated to the officer is it the same story that you are telling us this morning, Mr. Barrett?

A Yes, it is.

Q Were you telling your story in a narrative fashion, Mr. Barrett?

Do you know what I mean by the word "narrative"?

A Not really, no.

Q Was it a question—withdrawn.

Were they asking you questions?

A Like when I was telling them part of it and then he would like put things in, like trying to bring things in and I would make an answer to his question and then tell him the rest like how it happened and stuff.

Q You were telling what happened and then there might be some questions along the way?

A Yes.

Q And then you would respond to the questions; is that correct?

A Yes.

Q And then you would continue on with your story?

A Yes.

Q Was that the way it went during this interview?

A Yes, pretty much, yes.

Q Were you ever told, Mr. Barrett, that your interview was being recorded?

A No.

Q How long did that interview take?

A Maybe about a half an hour.

Q And before you commenced that interview, did you sign any additional papers in the presence of the police officer?

A No. I had signed all papers downstairs.

Q Downstairs?

A Yes.

Q And you remember signing two pieces of paper downstairs?

A Yes; the long one and the little card.

Q How much time elapsed, Mr. Barrett, between the time you executed the two pieces of paper downstairs and the time you commenced giving your story to the officer?

A I maybe talked to my mother for about five minutes; maybe ten minutes.

Q I see. What happened after you concluded giving your version of what happened, Mr. Barrett?

A Like he took me downstairs and they put me like in a cell.

Q And what was your condition? What was your physical condition at that point in time?

A It still was the same. I had asked them on the way downstairs if they were going to take us to the doctor and he had said that I had to wait a while.

Q And how long did you remain in the cell downstairs, Mr. Barrett?

A Maybe about a half hour or so; I am not really sure.

Q And did anyone talk to you in the cell while you were there?

A Yes. Like they had put me in the cell with Robert, Shag; he was in the cell. When I had gotten down to the cell, he was already down there.

Q Were you talking to Mr. Artis during this time?

A Yes. And then at that time, like when he put me in the cell, Shag said—

MR. LYONS: I am going to object to anything of any conversation.

THE COURT: Sustained.

Q You cannot tell us what he said.

A I'm sorry.

Q There was a conversation?

A Yes.

Q What happened after, after the half hour period to you; where were you brought?

A Then the same officer came downstairs again and told me that the chief wanted to talk to me.

Q Did he mention the chief by name?

A No. Not then, no.

Q Were you brought back upstairs again?

A Yes.

Q To where Mr. Barrett?

A To the chief's office.

Q Was this the same room that you were or office that you were the first time?

A No; this was not. This was just one desk room with like a couple of chairs. It was real small.

Q I see. And where—who was present in that room at this time?

A Cameron, the tall guy, me and I guess the lieutenant; chief, whatever.

Q Three people?

A Yes.

Q Was the door to that office closed?

A Yes.

Q And did the officers tell you why you were now being brought up a second time and placed in this office?

A No. He just had referred to me as the chief wanted to talk to me so I just went upstairs to talk to him.

Q When you got upstairs, what did they say to you?

A Like he had told me who he was and they had like started asking me like the same things that he had asked me before over again.

Q And did you respond in a narrative fashion or in a story fashion as to what happened, Mr. Barrett?

A Yes, I did.

Q And were there times during the course of your talking that the officers would ask you questions?

A Yes. Not as many as the first time but a couple of times.

Q I see. And did you indicate to the officers, Mr. Barrett, what you are indicating to us here today in court?

A Yes.

Q Did the officers, either one, the chief that you referred to or the other officer, Cameron, I believe you said, did they have you execute any pieces of paper; sign any pieces of paper before you started this second interview?

A No, they did not.

Q Was anything read to you before you commenced the second interview?

A No.

Q Did the officers, either before or after the interview, ask you if you wanted to make a written statement?

A No. They never asked me at no time while I was at the police station did I want to make a written statement.

Q Did they tell you, Mr. Barrett, at any time during the second interview, that you were being recorded?

A No.

Q Were the same things covered in interview Number 2 that were covered in interview Number 1?

A Yes, they were.

Q Now, at the termination of this second interview, Mr. Barrett, what was your physical condition?

A Like it was still the same. If anything, like it had gotten worse. Because, you know, it was getting harder to see and things were still blurry. And right then, I started rubbing my eyes and they had started hurting more at this time.

Q Did you request medical attention of anyone at the Wallingford police station at that point in time?

A Yes. I had told the guy, the chief, when were they going to take us to the hospital.

Q Now, did you see or talk to, Mr. Barrett, any other members of the Wallingford Police Department during the course of the time there in addition to the officers you have already told us about?

A Like as far as telling them what happened?

Q First of all, as far as telling what happened?

A No.

Q Did you see any other officers that have testified here in court during this trial there that evening?

A No, I did not.

Q What I mean, did you see visually Detective Ginorio?

A I had seen her, yes.

Q Where was she?

A Like when I first came out of the first room upstairs, she was sitting like behind the door and she was removing this cassette from the tape player at this time.

Q When was that?

A This was after the first interview.

Q You saw her removing something?

A I saw her removing a tape from the tape player.

Q Mr. Barrett, you have heard the testimony of Officer Cameron in this case, have you not?

A Yes.

Q And you have heard what Officer Cameron said you said to him at the Wallingford police station during the two interviews. Is that correct?

A Yes.

Q Was Officer Cameron's testimony as you recall it, an accurate reflection of what you told him during the course of the two interviews?

A No, it was not.

Q Did there come a time that you were transported to a hospital?

A Yes, there was.

Q And when did that occur, Mr. Barrett?

A Maybe about 9:30, 10:00. Something like that. I am not really sure.

Q In the a.m.?

A Yes. It was in the morning time.

Q And do you remember what hospital you went to?

A Veterans Memorial.

* * *

Q Where in the hospital?

A In the emergency room.

Q Was your face looked at at the hospital?

A Yes, it was.

Q Were your hands looked at at the hospital?

A Briefly, yes.

Q What were you told to do regarding your injuries, if anything, Mr. Barrett?

A That I was supposed to see an eye doctor within three days after he had made a prescription out for some kind of drops. I am not sure what kind but he had stated that he wanted me to see an eye doctor within three days.

Q Would that have been the doctor at the emergency room?

A Yes.

Q From the emergency room at the hospital, where did you go, Mr. Barrett?

A We came back to the Wallingford police station.

Q And were you there for a period of time?

A Not that long; maybe about 15 minutes.

Q And after that, where did you go?

A To the courthouse.

Q Where?

A I am not sure. I guess Wallingford. I am not sure where the courthouse is in Wallingford.

Q But you were brought to court eventually that morning?

A Yes.

Q Did you have an attorney at court when you arrived that morning?

A Of my own?

Q Of your own.

A No. Like there was—I guess it was his job, the guy that represented all the people that come there. It was not my attorney. It was just the attorney for the courthouse.

Q Did you have an attorney at that time?

A No. I did not have one, no.

Q And, Mr. Barrett, after your court appearance that morning—by the way, do you remember approximately what time it was that you got to court? Was it still the morning hours?

A Maybe about 11:00, 12:00; I am not really sure.

Q After court, where did you go?

A We went to Whalley Avenue.

Q What's at Whalley Avenue?

MR. LYONS: I am going to object on the grounds of relevance.

* * *

***about force and her asking to get out of the car, that is just a pack of lies, too?

A Yes, it is.

Q And with respect to being advised of your so-called Miranda rights, or constitutional rights at the Wallingford Police Department on the morning of October 24th of 1980, you just testified, did you not, that you were advised once?

A Downstairs, yes.

Q And by whom? I forgot.

A I think it was, like I said, the big cop.

Q The tall—

A No. Big, mustache.

Q Not the cop that testified before the jury?

A No.

Q And did you hear your rights as they were read to you?

A Yes, I did.

Q So did your blurry vision interfere with your ability to hear your rights?

You heard your rights, did you?

A Yes, I did.

Q And did you understand them as they were read to you?

A Yes.

Q And did you tell the officer you understood your constitutional rights as they were read to you?

A I am not sure I told him I understood but I heard him read them.

Q I am asking you now. Did you understand them?

A Yes, I did.

Q And you knew what your rights were right there and then?

MR. SOLOMON: Now he's going on and on. He has asked the question if he understood and it was responded yes.

THE COURT: I think, counsel, you gave a couple of on and on but I am satisfied the question is asked and answered.

Q After being advised of your constitutional rights, one time, you testified you signed two pieces of paper at the same time; is that correct?

A Yes.

Q And you are sure about that?

A Yes, I am.

Q Now, showing you what has been marked as State's Exhibit Z, would you please look at that, Mr. Barrett, and indicate what the date and time advised is on that form?

A 6:12.

Q 6:12 when? A.M. or P.M.

A It just says a.m.

Q And is that your signature that appears here?

A Yes, it is.

Q And did you read this before signing that form?

A Like—

Q Yes or no, please?

A No, I did not read it. He gave me a brief description of it.

Q He did not read it to you from that form?

A No.

Q You heard him testify that he did?

A I heard him testify a lot of things that he did.

Q He is lying when he said he read from this form?

A Yes, he is.

Q But it does say here 6:12 a.m.?

A Yes.

Q And did you sign it?

A Yes, I did.

Q Now, showing you what has been marked as State's Exhibit—incidentally, what is the police officer's name who is on that form?

A Cameron.

Q And he is the tall officer who testified in this case?

A Yes.

Q Showing you what has been marked as State's Exhibit W, does that contain your signature?

A Yes, it does.

Q And you signed that at the same time that you signed this form; is that correct?

A Yes.

Q After being advised once of your so-called constitutional rights?

A Yes.

Q Could you read those four digit numbers?

A 0630.

Q And did you hear Officer Cameron testify that you signed this at 6:30 in the morning after being advised again of your constitutional rights?

A I heard him say that.

Q He is lying about this, too?

A Yes, he is.

THE COURT: It is one o'clock. I will caution the jury to please remember my earlier admonishments.

Thank you. See you at two o'clock.

(Whereupon, the luncheon recess was taken.)

(Whereupon, court was back in session.)

* * *

Q Mr. Barrett, at some point you have testified after you signed forms that you were brought upstairs to the upper floor of the Wallingford Police Department; is that correct?

A Yes.

Q And at that point, someone asked you questions and you told them your story; is that correct?

A Yes, sir.

Q Who was that person, again?

A Cameron.

Q Officer Cameron?

A Yes.

Q And did you testify that you told that story to Officer Cameron alone and nobody else was in the room?

A Yes.

Q Now, did you hear Officer Cameron testify that another person, Sergeant John Genovese, was present during that?

A Yes, I did.

Q And would Officer Cameron be lying about that fact to the jury?

A Yes. Because it was just me and him in the room.

MR. SOLOMON: Your Honor, I don't know if I am on solid ground or not, very frankly, but maybe, it is cross.

Attorney Lyons continues to use the word "lying." I don't know how the Court feels about that. I am somewhat ambivalent, myself, but he is using it several times and I imagine he is going to use it almost to the point, your Honor, where it will become a regular word in his cross.

I am going to object, your Honor, on the basis that I feel, number one, it is inflammatory; number two, it is an improper suggestion.

The function of whether the jury is to believe a particular witness, your Honor, is strictly theirs. I just feel uncomfortable about the word "lying." I don't know how your Honor reacts to that.

THE COURT: Mr. Lyons, would you care to respond?

MR. LYONS: Frankly, I don't see anything wrong with it. If the Court does not want me to proceed in that way, I won't.

I think the door was open to some extent by counsel's questions on direct examination of his own

client when he asked a question about the accuracy of Officer Cameron's testimony and statements.

I think it is a fair for me to probe that which I am trying to do.

THE COURT: Well, all you are accomplishing with that characterization, you are seeking the characterization from the witness. Really, he is not in a position to be able to tell whether something is true or untrue or whether it comes from someone else.

It could be a mistake; it could be anything. I think that is a question for the jury to decide and I would caution you not to use that characterization.

MR. LYONS: Fine.

Q Mr. Barrett, Officer Cameron, as you recall, did testify that Sergeant Genovese was present, correct?

A Yes.

Q And you have testified that he was not, correct?

A Yes.

Q And at some point that interview, or whatever you want to call it, ended; did it not?

A Yes.

Q And you were returned to the cell in a basement floor?

A Yes.

Q And about a half hour later, you were brought back up again to the upper floor; is that correct?

A Yes.

Q Now, at that time, you testified that Cameron said you were going to see the chief or lieutenant. Do you recall which it was?

A He referred to him as the chief. But like I found out, it was the lieutenant.

Q Would that be Lieutenant Murt Howard?

A I guess so; I don't know.

Q Did he refer to him as chief of detectives, if you recall?

A I just remember chief.

Q But later you learned it was Lieutenant Murt Howard?

A Yes.

Q And you have testified that you spoke to Officer Cameron and the lieutenant a second time; is that correct?

A Yes.

Q Now, prior to the time that they spoke to you, did either one or both of them advise you of your so-called Miranda rights?

A At the time I spoke to them, they never advised me of the rights. I had been read the rights downstairs.

Q Right at that moment before they proceeded with that second interview they never read you your rights?

A They did not.

Q And you heard Officer Cameron tell the ladies and gentlemen of the jury that the rights were, in fact, read to you?

A Yes.

Q And you have testified that on neither occasion did any officer ask you if you wished to make a written statement; is that correct?

A Yes, I did.

Q And you heard Officer Cameron testify that that opportunity was given to you; is that correct?

A Yes.

Q And you further testified that the story that you told to the Wallingford police on the morning of October 24th of 1980, is the same as the story you have told today in court; is that not correct?

A Yes.

* * *

Supreme Court, U.S.
FILED
JUL 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-899

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

WILLIAM BARRETT,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF OF THE PETITIONER

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QUESTION PRESENTED

Is the Fifth Amendment privilege against self-incrimination abridged when a defendant, although reluctant to sign a written statement in the absence of counsel, nevertheless gives a knowing and voluntary oral statement to investigating officers?

LIST OF ALL PARTIES

The sole petitioner is the State of Connecticut. The sole respondent is William Barrett.

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No. 85-899

In The

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STATE OF CONNECTICUT,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF OF THE PETITIONER

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 197 Conn. 50, 495 A.2d 1044 (1985), and is reprinted in Appendix A to the Petition, pages 1A-12A. This Court's grant of certiorari is reported at 106 S.Ct. 1967 (1986).

JURISDICTION

The Connecticut Supreme Court announced its decision on July 30, 1985. The State of Connecticut filed its motion to reargue on August 9, 1985, which motion was denied on September 24, 1985. The Petition for Writ of Certiorari was timely filed on November 22, 1985 and was granted by this Court on May 19, 1986. This Court's jurisdiction is based on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [Nor] shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

In New Haven, Connecticut on the evening of October 23, 1980, the victim, M.J., was waiting for a bus.[1] While waiting, she was offered a ride by Robert Artis and the Respondent, William Barrett, both of whom she had known for approximately eight years. M.J. accepted Barrett's offer.

Rather than drive M.J. to her destination, Barrett and Artis drove to a secluded area in Wallingford, Connecticut. There M.J. was repeatedly sexually assaulted by both men. During this attack, M.J. sustained, *inter alia*, facial and wrist injuries.[2] She did manage to scratch Barrett.[3] M.J. also was successful in hiding diverse evidence of the sexual assault in the rear seat of Barrett's vehicle.[4]

Upon returning to New Haven, the victim immediately advised family and police officials of the assault, naming both assailants.[5] Barrett and Artis were taken into custody later that evening by the New Haven Police Department. Upon apprehension, Barrett attempted to conceal his identity.[6] At that juncture, the arresting officers advised Barrett of his *Miranda* rights.[7]

Because the sexual assault occurred in Wallingford, personnel from that town transported Barrett and Artis to the Wallingford Police Station. The suspects arrived at the police

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[1] Unless otherwise noted, the statement of the case derives from the opinion of the Connecticut Supreme Court.

[2] Trial transcript (Tr.) at 9.

[3] Tr. at 14.

[4] Tr. at 25-26. This evidence included her undergarments, loosened car upholstery buttons and M.J.'s initials scratched in the car seat.

[5] Tr. at 261.

[6] Tr. at 231.

[7] Tr. at 234, 255, 298.

station's processing room at approximately 5:30 a.m. There, Officer Peter Cameron read Barrett the *Miranda* rights from a standard acknowledgement form. Barrett signed and dated that form.[8] Barrett then made several telephone calls; the officers did not know either the purpose or the recipients of those calls.[9]

Cameron and Officer John Genovese led Barrett to a police interrogation room where Genovese read Barrett the *Miranda* rights for a third time. Barrett once again signed and dated an Acknowledgement of Rights form.[10] Cameron then asked Barrett "if he would like to make any kind of statement to the police regarding the incident with which he was charged."[11] Barrett responded that "[h]e would give no written statement to the police; nothing in writing; however, he would be more than happy to talk about it. He had no problem with that."[12] The interrogating officers testified that Barrett's subsequent narrative statement appeared to be voluntary.[13]

Barrett proceeded to tell the officers his account of the encounter with M.J. His statement was in the nature of a narrative, punctuated with occasional questions from Cameron and Genovese aimed at clarifying certain details. Barrett answered some of these questions; he ignored others.[14]

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[8] Joint Appendix (J.A.) at 6A–8A, 9A.

[9] J.A. at 21A, 98A.

[10] J.A. at 6A, 9A, 30A, 31A.

[11] J.A. at 9A, 21A.

[12] *Id.* During cross-examination, Officer Cameron testified that Barrett wanted to consult with counsel before signing a written statement.

[13] J.A. at 26A.

[14] J.A. at 24A.

Later that morning, Lieutenant Murt Howard once again advised Barrett of the *Miranda* rights; Barrett responded orally that he understood them.[15] Asked by Howard whether he would give police a written statement about his version of the encounter with victim, Barrett replied that "he was willing to talk about it verbally but he did not want to put anything in writing until his attorney came."[16] A second narrative proceeded much like the first, with Barrett controlling the scope of the interview.[17]

At a pre-trial suppression hearing Barrett contended he had neither comprehended nor relinquished his *Miranda* rights.[18] He did not claim that he had requested counsel for his oral statement. At the conclusion of the suppression hearing, the trial court ruled that Barrett's actions were evidence Barrett totally comprehended the import of his rights and had voluntarily waived them. It therefore denied Barrett's Motion to Suppress and permitted the prosecution's use of Barrett's oral statements.

The Respondent did not testify at the suppression hearing.[19]

On appeal Barrett raised for the first time the argument that he had invoked his right to counsel prior to the police

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[15] J.A. at 31A-32A, 39A, 48A-49A.

[16] J.A. at 44A.

[17] J.A. at 56A.

[18] Tr. at 590.

[19] The Respondent did testify at trial, offering basically the same exculpatory version of events as he had related to the investigating officers. He further volunteered that he never attempted to contact an attorney prior to his interrogation. Instead he called his mother. (J.A. at 117A, 128A) The Respondent denied testimony that he was unwilling to make a written statement; he testified that the officers never requested any written statement. (Tr. at 858, 889, J.A. at 119A, 124A, 137A) Although the Respondent at trial complained of medical impairment during his interrogation, he admitted that he received and understood his rights. (J.A. at 125A, 130A)

interrogation. He argued on appeal that his oral statements were therefore involuntary. The Connecticut Supreme Court found the admission of the statements was error, holding:

> The defendant's refusal to give a written statement without his attorney present was a clear request for the assistance of counsel to protect his rights in his dealings with the police. *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197, reh. denied, 444 U.S. 887, 100 S.Ct. 186, 62 L.Ed.2d 121 (1979). Such a request continues to be constitutionally effective despite the defendant's willingness to make oral statements. We conclude, therefore, that the defendant did invoke his right to counsel under the Fifth and Fourteenth Amendments.

Petition at 8A.

On May 19, 1986, this Court granted the State of Connecticut's petition for a writ of certiorari to consider whether a criminal suspect's reply to police that he is willing to discuss orally the matter under investigation, but that he will not give a written statement without having an attorney present, makes unconstitutional the use of any oral statement thereafter given.

SUMMARY OF ARGUMENT

In *State v. Barrett*, 197 Conn. 50, 495 A.2d 1044 (1985), the Connecticut Supreme Court applied a rigid rule which required all questioning to cease upon a suspect's mention of the word "attorney." This inflexible rule miscontrues the holdings of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477, *reh. denied*, 452 U.S. 973 (1981), ascribing a talismatic quality to the word "attorney" in a situation where a suspect's oral statement is clearly voluntary.

The Respondent, faced with a choice of options, elected to speak with police and defer legal representation. This choice should not be construed as an assertion of the right to counsel at oral interrogation. It was simply a selective waiver of representation.

Through its arbitrary analysis of the facts presented, the Connecticut Supreme Court adopted a paternalistic approach to criminal interrogation. The decision ignores the balance created by *Miranda* and *Edwards* between the interests of law enforcement and the right of an individual to be free from coerced self-incrimination.

ARGUMENT

THE RESPONDENT NEVER ARTICULATED A DESIRE FOR COUNSEL AT HIS INTERROGATION. CONSEQUENTLY, INVESTIGATING OFFICERS PROPERLY ALLOWED THE RESPONDENT TO NARRATE HIS VERSION OF THE EVENTS AT ISSUE

A. Barrett's Oral Statements Were Voluntary

At the Wallingford Police Station Barrett, fully cognizant of his constitutional rights, determined that it was in his best interests to waive those rights for a limited purpose. Consequently, he gave an oral narrative of the events in question. The oral statement was unconditional. Barrett did, however, refuse to give a written statement without an attorney present.

In ruling on the question presented below, the Connecticut Supreme Court applied a rigid rule which required all questioning to cease upon a suspect's mention of the word "attorney." Relying on *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477, *reh. denied*, 452 U.S. 973 (1981),[20] the Connecticut Supreme Court concluded that Barrett's refusal to reduce his oral statement to writing without the assistance of counsel was a "request for counsel" under *Edwards* which mandated exclusion of all oral statements. This conclusion misconstrues the holdings of *Miranda* and *Edwards*, and the policies underlying them, by ascribing an unwarranted talismatic quality to the use of the word "attorney" by a suspect who is subsequently interrogated.

This Court has held repeatedly that the test for determination of a valid waiver for the Fifth Amendment right is not

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[20] The Connecticut Supreme Court specifically disavowed any reliance on state law. 197 Conn. at 54 n.3.

mechanical, but requires an examination of the totality of circumstances in each particular case. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). This Court has never isolated a defendant from his own intelligent and voluntary decisions about a criminal case. *Faretta v. California*, 422 U.S. 806, 835 (1975); *Michigan v. Mosley*, 423 U.S. 96, 109 (1975). Rather, the Court has set certain standards by which a trial court can measure the validity of a waiver of the Fifth Amendment privilege against self-incrimination. *Johnson v. Zerbst*, 304 U.S. 458 (1938). The test for voluntariness is not whether there has been literal compliance with the procedure set forth in *Miranda; see Michigan v. Tucker*, 417 U.S. 433, 444 (1974); but whether the waiver of rights was made "with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 106 S.Ct. 1135, 1141 (1986). *See also North Carolina v. Butler*, 441 U.S. 369, 374–75 (1979). The issue before the trial court was whether Barrett's free choice was substantially impaired. Despite the Connecticut Supreme Court's obfuscation of issues, the same question is presented to this Court.

B. The Respondent's Limited Invocation Of Rights Was Scrupulously Honored

In the present case William Barrett was an educated, intelligent individual capable of articulating a desire for immediate representation. He chose not to assert this right. Instead, Barrett deferred invocation of his right to legal representation until such time as the Wallingford police investigators attempted to obtain a written statement. The Petitioner recognizes that something short of a formal or direct request for counsel might be construed as an assertion of the right to counsel. However, in the present case Barrett never articulated a request for counsel during interrogation. Consequently, his statements were admissible.

Barrett, faced with a choice of options, elected to speak with the police and defer representation. This was his right.

Having stated without the slightest hesitancy that he would answer questions, Barrett in no way invoked his right to counsel for that oral interrogation. *See, e.g., Bradburn v. McCotter,* 786 F.2d 627 (5th Cir. 1986); *United States v. Eirin,* 778 F.2d 722 (11th Cir. 1985); *United States v. Jardina,* 747 F.2d 945 (5th Cir. 1984). Instead, he selectively waived his right to representation, choosing to limit that protection to the execution of a legal document. This type of selective representation has been recognized by this Court. *Wyrick v. Fields,* 459 U.S. 42, 47 (1982).

In *Wyrick v. Fields,* the defendant, who was represented by counsel, agreed to waive the presence of his attorney during a polygraph test. At the conclusion of the test, the examiner told Fields that the polygraph indicated some deceit and suggested Fields explain his answers. Fields then made several incriminatory statements.

This Court recognized the validity of Field's limited waiver of representation, holding:

> Fields waived not only his right to be free of contact with the authorities in the absence of an attorney, but also his right to be free of interrogation about the crime of which he was suspected. Fields validly waived his right to have counsel present at "post-test" questioning, unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a "knowing and intelligent relinquishment or abandonment" of his rights. 451 U.S. at 482.

459 at 47. This Court concluded that any expansion of the rule in *Edward v. Arizona* was an unreasonable interference with police interrogation. *Id.* at 49.

C. The Rule Enunciated By The Connecticut Supreme Court Alters The Balance Inherent In *Miranda*

The purpose of *Miranda v. Arizona* is to "assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process." *Miranda*, 384 U.S. at 469. The requisite warnings gave individuals the opportunity knowingly and intelligently to waive certain rights; *Id.* at 479. Rather than imprison a suspect in his privileges; *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942); *Miranda* provides suspects with the freedom necessary to make an informed choice, depending upon their own perceptions of their best interests.

The right to counsel enunciated in *Miranda* is extremely narrow. This Court has never required counsel's attendance at custodial interrogation. Instead *Miranda* merely confers upon a defendant a "right to counsel," but only when such counsel is requested during custodial interrogation. *Michigan v. Jackson*, 106 S.Ct. 1404, 1407 (1986). *See also Moran v. Burbine*, 106 S.Ct. 1135, 1142 n.1 (1986).

Similarly, the protection of the right to counsel provided by the *Edwards* decision is applicable only to situations where "an accused, . . . having expressed his desire to deal with police only through counsel, is not subject to further interrogation . . ." *Edwards*, 451 U.S. at 484–85. *See also Smith v. Illinois*, 105 S.Ct. 490, 492 (1984) (per curiam).

In the present case, Barrett told police that he would not give them a written statement without an attorney present, but he had no problem in talking about the matter in question. The record contains no indication, and the court below nowhere suggests, that Barrett was laboring under the impression that oral statements were any less admissible in criminal proceedings than written statements. Indeed, prior to the first interview with the Wallingford police, Barrett had been advised of his *Miranda* rights on three separate

occasions. At least twice, he had acknowledged that he understood those rights and had signed a printed form that set them forth. Among the rights that were read to and acknowledged by Barrett was the right to remain silent with the concomitant warning that if he talked to the police officer, anything he said could and would be used against him in court. Also among those rights were the rights to consult with a lawyer and the right to have counsel with him during questioning, and the right to have a lawyer appointed before any questions. At trial, Barrett admitted comprehension of those rights. He chose in clear terms to waive those rights.[21]

The trial court concluded that Barrett comprehended his Fifth Amendment privilege against self-incrimination. He was advised on at least three separate occasions of his Miranda rights; Barrett testified he understood those rights as read. Through its arbitrary analysis of the facts presented, the Connecticut Supreme Court concluded that painstaking compliance with *Miranda* is never enough. In an overly paternalistic approach to criminal interrogation, that court concluded that a voluntary, intelligent, rational decision to speak in the absence of counsel could be negated by a suspect's mere mention of the word "attorney" at any point and in any context. The Petitioner submits that this result destroys the existing balance created by *Miranda* and *Edwards* between the

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[21] In its opinion, the Connecticut Supreme Court stated that the trial court "impliedly found that the defendant had requested counsel." In a footnote accompanying that statement, the Connecticut Supreme Court stated that "[t]he trial court noted the defendant's refusal to give a written statement without an attorney during its discussion of the defendant's waiver of his rights." Petition at 7A. Hence, the "implied finding" ascribed to the trial court is nothing more than the trial court's acknowledgement that Barrett refused to give a written statement without an attorney. In fact, the issue of whether Barrett invoked his right to counsel was never before the trial court; rather, Barrett's claim that he invoked his right to counsel during his discussions with police was first made only on appeal to the Connecticut Supreme Court. *State v. Barrett*, 197 Conn. 50 (1985). Indeed, Barrett testified at trial testimony that the police never asked him to make a written statement. See footnote 19, *supra*.

interests of law enforcement agents and the right of an individual to be free from coerced self-incrimination.

The *Miranda* decision arose in the context of an incommunicado interrogation at which full warnings of available constitutional protections were not given. *Miranda v. Arizona*, *supra*, 384 U.S. at 445. This Court was troubled in *Miranda* by "intimidation," "unfamiliar atmosphere" and "menacing police interrogation." *Id.* at 457. The Court refused however to rule that self-incriminating statements made in the absence of counsel are always inadmissible, choosing instead to balance the competing societal and individual interests.

> Custodial interrogations implicate two competing concerns. On the one hand, "the need for police questioning as a tool for effective enforcement of criminal laws" cannot be doubted. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). Admissions of guilt are more than merely "desirable;" *United States v. Washington*, 431 U.S. at 186; they are essential to society's compelling interest in finding, convicting and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *New York v. Quarles*, 467 U.S. at _____. *Miranda* attempted to reconcile these opposing concerns by giving the defendant the power to exert some control over the course of the interrogation.

Moran v. Burbine, 106 S.Ct. at 1144.

Nothing presented in this case warrants a realignment of the delicate balance struck by the *Miranda* Court. When a defendant has given a voluntary, knowing, intelligent waiver of his right to counsel at interrogation, police are not required

to supply advice designed to help a suspect better evaluate his or her self-interests. *United States v. Washington*, 431 U.S. 181, 188 (1977). Officers are not required either to provide a legal interpretation of the language of *Miranda* or to supply suspects with a constant flow of potentially relevant information. *Moran v. Burbine*, 106 S.Ct. at 1141–42. *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973) (en banc). Nor is error-free interrogation the relevant criterion. *See Oregon v. Elstad*, 470 U.S. _____, 105 S.Ct. 1285, 1293 (1985); *Michigan v. Tucker*, 417 U.S. 436, 446 (1974). The relevant inquiry remains whether under the totality of circumstances the suspect's free will was overborne. The trial court found no such compulsion and the record reflects none.

The fact that Barrett in spite of repeated *Miranda* warnings might have believed oral statements to be less damaging than written statements does not render his voluntary statement inadmissible. There is ample authority for the proposition that refusal to sign a written form does not preclude a finding of waiver. *See North Carolina v. Butler*, 441 U.S. 369, 375 n.5 (1979).[22]

Respondent's mention of his desire for counsel was neither contradictory nor equivocal. A statement is contradictory only if it is internally inconsistent. *Nash v. Estelle*, 597 F.2d 513, 523 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979). It would be equivocal only if a suspect expresses a dual desire to simultaneously have counsel and to continue interrogation without counsel. *Id.*

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[22] *Harris v. Riddle* 551 F.2d 936 (4th Cir.), *cert. denied*, 434 U.S. 849 (1977); *United States v. Gardner*, 516 F.2d 334 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); *See also United States v. Cooper*, 449 F.2d 1060 (D.C. Cir. 1974); *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973) (*en banc*); *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *United States v. Stevens*, 445 F.2d 304 (6th Cir.) (per curiam), *cert. denied*, 404 U.S. 945 (1971); *United States v. McNeil*, 433 F.2d 1109 (D.C. Cir. 1969); *Pettyjohn v. United States*, 419 F.2d 651 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970); *Klinger v. United States*, 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969).

By unduly expanding *Miranda* and *Edwards,* the Connecticut Supreme Court has created an inflexible rule that would exclude all statements of a defendant if the word attorney is mentioned, even where the defendant's willingness to speak in the absence of counsel is clearly, intelligently and voluntarily stated.[23] *Miranda* and *Edwards* shield an individual only from the compulsion induced by a police-dominated atmosphere; they do not prevent him from placing conditions on his conversations with police or allow him to rescind a voluntary and intelligent waiver once interrogation is completed. The defendant willingly agreed to give an oral statement to police, and that statement is admissible. The statement was therefore admissible.

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[23] The trial court found Barrett's statements were voluntary. This finding was not questioned by the Connecticut Supreme Court. Consequently, the voluntariness of these statements is not an issue before this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Supreme Court of the State of Connecticut.

Respectfully submitted,

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BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

Whether an accused who is in custody, and who has clearly requested counsel prior to making a written statement, has invoked his right to counsel requiring a cessation of interrogation until an opportunity to confer with counsel is afforded him?

Whether an accused's right to counsel is violated when, prior to interrogation he informs the police that he wants nothing in writing prior to speaking with an attorney and the police proceed to interrogate the accused and promptly thereafter reduce his statements to writing?

Whether an ambiguous request for counsel which is ambiguous with regard to certain conditions requires either a cessation of interrogation or, at a minimum, a clarification of the conditions and the ambiguities prior to proceeding with interrogation?

Whether under all the circumstances, the respondent's statements to the police were voluntary?

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CONSTITUTION AND STATUTES:

United States Constitution

Fifth Amendment	*passim*
Fourteenth Amendment	*passim*

STATEMENT OF THE CASE

On October 23, 1980, the respondent, William Barrett, was arrested and taken into the custody of the New Haven, Connecticut Police at approximately 11:30 p.m., (TR 230-232) as the result of the allegations of M.J., to the effect that the respondent had sexually assaulted her.

The respondent was transported to the Wallingford Police Station by Wallingford Police officers at approximately 5:30 a.m. on the morning of October 24, 1980. (JA 5A, 6A) He was advised of his rights, pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966) at 6:12 a.m. (J.A. at 8A) At that time, the respondent appeared to be disheveled, physically injured and upset. (J.A. at 17A) The police were aware that the respondent had never been arrested before and was unfamiliar with police procedure.[1]

Upon being advised of his *Miranda* rights, the repondent refused to give a written statement until his attorney arrived. (J.A. at 21A) He stated "he would give no written statement to the police, nothing in writing." (J.A. at 21A) The Wallingford Police officers interviewed the respondent at this point, unsuccessfully attempting to tape-record the interview. (J.A. at 26A)

Upon discovering the malfunctioning of the tape recorder the Wallingford Police interviewed the respondent a second time, again, unsuccessfully attempting to tape-record the interview. (J.A. at 27A-34A) Prior to the second interview, the respondent stated, "he did not want to put anything in writing until his attorney came." (J.A. at 44A)

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[1] *State* v. *Barrett*, 197 Conn. 50, 57 ftnt 9.

Subsequently, three officers reduced the respondent's statement to writing by filing written reports containing the respondent's statement.[2] At no time was the respondent told that the police officers were attempting to record the interview. (J.A. at 28A, 63A)

The trial court denied the respondent's motion to suppress the statements made by the respondent during the custodial interrogations. (J.A. at 70A, 71A) Eventually, two of the officers testified at trial, having reviewed their written reports containing the respondent's alleged statements made more than two years earlier. (J.A. at 90A, 91A; TR. 718-720) The respondent was convicted of *inter alia*, Sexual Assault, First Degree, C.G.S.A. § 53a-70(a), and committed to the Commissioner of Corrections for a total period of incarceration of not less than nine (9), nor more than eighteen (18) years. (J.A. at 3A, 4A)

Upon appeal, the Connecticut Supreme Court set aside the judgment and ordered a new trial on the grounds that the statements of the defendant were inadmissible, and that they had been obtained in violation of his rights under the cases of *Miranda*, *supra* and *Edwards* v. *Arizona*, 451 U.S. 477 (1981).[3]

SUMMARY OF ARGUMENT

Under the decision of this Court in *Edwards* v. *Arizona*, 451 U.S. 477, Reh. denied, 452 U.S. 973 (1981), once an accused has invoked his right to counsel, that right cannot be waived unless the accused himself initiates further conversations with the police. In the case of *State*

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[2] States Exhibit A, B, and C for purposes of the suppression hearing only, Tr. 422, 426, J.A. 89A, 90A, 91A, 92A.

[3] *State* v. *Barret* at 60.

v. *Barrett*, 197 Conn. 50, 495 A.2nd 1044 (1985), the Connecticut Supreme Court ruled that a defendant had invoked his right to counsel when he indicated a desire to confer with counsel prior to putting anything in writing.

When a respondent makes such a request and evidences an intent to protect and preserve his Constitutional Rights under the Fifth Amendment, he is not subject to further interrogation unless he is afforded an opportunity to confer with counsel or unless he himself initiates further conversations with the law enforcement officers involved.

In any event, the police officers involved in this case did not take the necessary steps to preserve the respondent's Constitutional Rights. They failed to cease their interrogation of the respondent when he requested the opportunity to confer with counsel. They failed to honor his request for counsel prior to putting anything in writing. If, as the petitioner claims, respondent's request did not require the cessation of all interrogation, certainly it required the police officers to refrain from taking any statements which they intended to reduce to writing prior to affording the respondent the opportunity to confer with counsel.

When a request for counsel is made by an accused which is less than all-encompassing or less than entirely clear, police officers have an obligation to either cease the interrogation or, at a minimum, to clarify the request of the accused. In the case at bar, police officers did neither. Rather, the officers took it upon themselves to interpret the request in the most narrow fashion possible and then proceeded to do everything possible to circumvent the intent of the respondent to afford himself some protection through counsel.

At a minimum, the trial court should have taken the respondent's request for counsel into consideration in determining whether or not his alleged waiver of his Fifth Amendment rights was truly a knowing waiver. The trial court failed to consider this a factor and, therefore, erred in not suppressing the testimony of the police officers involved.

ARGUMENT

I. THE RESPONDENT'S ALLEGED STATEMENTS WERE INADMISSIBLE BECAUSE THE RESPONDENT HAD MADE A CLEAR REQUEST FOR COUNSEL AND NEVER WAIVED HIS RIGHT TO COUNSEL.

As the Connecticut Supreme Court held, there was neither ambiguity nor indecisiveness concerning the fact that the respondent had requested counsel to assist him in protecting his Constitutional Rights against self-incrimination.[4] The *Miranda* Court made clear the procedure which law enforcement officers were required to follow subsequent to informing one of his rights.

> "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Miranda, supra at 474.

The words "in any manner" have long been the hallmark of an individual's ability to invoke his right to counsel under the *Miranda* decision. See e.g. *United States* v. *Franzen*, 653 F.2d 1153(7th Cir. 1981); *White* v. *Finkenbeiner*, 611 F.2d 186, 189 (7th Cir. 1979). The invocation of

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[4] *Id.* at 56.

a condition with the request for counsel in no way results in a waiver of that right.

Once the right to counsel has been invoked in any manner, the decision of this Court in *Edwards* v. *Arizona*, *supra* is controlling. Having invoked his right to counsel, a defendant is not subject to further custodial interrogation even if he has been advised of his rights "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police" *Edwards*, *supra* at 484, 485. Clearly, in the case at bar, the respondent did not initiate any further communication with the police. In fact, there was no break at all in the interrogation of the respondent.

The facts in the *Edwards* case are also instructive. The petitioner in the *Edwards* case was willing to make a statement so long as it was not tape recorded. The police informed the defendant that the tape-recording was irrelevant since they could testify in open court as to whatever he said. While the holding in *Edwards* stems from the invocation of the right to counsel earlier than this conversation, notably in the *Edwards* case, the officers took the time to explain that there was no legal or substantive difference between an oral statement and a tape-recorded statement. Nonetheless, this Court held that any statement so obtained was inadmissible. In the case at bar, the officers did not even attempt to explain to the respondent that the dichotomy drawn by him between the written statement and the oral statement, indicated a blatant lack of understanding of his right and of the warning given.

The *Miranda* Court itself noted that there can be no meaningful distinction between a formal confession and statements which may later amount to admissions.

> "No distinction can be drawn between statements which are direct confessions and statements which

> amount to 'admissions' of part or all of an offense . . . Similarly . . . no distinction may be drawn between inculpatory statements and statements alleged to be merely exculpatory."

Miranda, supra at 476.

The case at bar does not present a situation where the respondent was equivocal as to whether or not he wanted counsel. In the case at bar, the respondent stated unequivocally that he did want counsel. Compare, *People* v. *Krueger*, 412 N.E.2d 537 (Ill. 1980); *People* v. *Superior Court*,542 P.2d 1390, 1394-1395 (Cal. 1975); *cert denied*, 429 U.S. 816 (1976); and *People* v. *Rafac*, 364 N.E.2d 991 (Ill. App. 3d 1977). In the cited cases, the defendants expressed equivocation about whether or not they wanted counsel. However, in the case at bar, there was no such equivocation. The respondent, having expressed his desire to have an attorney assist him in the protection of his rights, the Wallingford Police were obliged to cease all questioning until counsel was present or, under *Edwards*, until the respondent himself initiated a conversation. This they failed to do.

In the case of *Ochoa* v. *State*, 573 S.W.2d 796 (Tex. Crim. App. 1978), the defendant, during the course of police interrogations stated, "well I will talk to you but I don't want to sign anything". Relying on the "in any manner" language of *Miranda*, the Texas Court of Criminal Appeals held that such a statement must be construed as invoking a criminal defendant's Fifth Amendment rights requiring cessation of all interrogation, unless such interrogation is subsequently initiated by the defendant. *Ochoa, supra*, at 800-801.

Recent cases of this Court cited by the petitioner as requiring a contrary result are inapposite. In the case of *Wyrick* v. *Fields*, 459 U.S. 42 (1982), the defendant

clearly intiated the discussion with the police after he had been afforded the opportunity for counsel. Likewise, in the case of *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983), the defendant, after having invoked his right to counsel clearly initiated further discussions with the police. In the case at bar there is no question that the respondent was not the initiator of discussion with the police. *Solem* v. *Stumes*, 104 S.Ct.1338 (1984) is also not controlling, having been decided on the issue of retroactivity.

II. THE POLICE DID NOT HONOR THE RESPONDENT'S REQUEST FOR COUNSEL WITHIN ITS LIMITED SCOPE.

The petitioner's argument is two-fold. First, the petitioner argues that a request for counsel, which is not all-encompassing but is somewhat limited in scope, does not require a cessation of interrogation prior to an opportunity to obtain the advice of counsel. This argument has been dealt with in the previous section.

Second, the petitioner argues that because the police "scrupulously" honored the respondent's request for counsel within its scope, the statements obtained are admissible. The argument is based upon a faulty assumption and, therefore, collapses from its own weight.

For example, the petitioner's brief states that the respondent chose "to limit the protection to the execution of a legal document". *Brief of the Petitioner*, at Page 10. But, this is not what the respondent requested. The Brief of *Amici Curiae Alaska, et al.* states that, "the defendant clearly, and unequivocally, indicated that he would not *sign* a written statement without an attorney." *Brief of Amici Curiae Alaska, et al.*, at 3. (emphasis added). But, this is not what the respondent requested.

According to the testimony of Officer Cameron, the respondent stated that "he would give no written statement to the police; *nothing in writing*." (J.A. at 21A) (Emphasis added) According to the testimony of Lieutenant Howard, the respondent stated, "he did not want to put anything in writing." (J.A. at 44A)

But, in fact, the Wallingford Police, in direct contradiction to the respondent's request, did reduce his statements to writing only an hour after the second interview. (J.A. at 90A) It is the petitioner's claim that the respondent's words "nothing in writing" mean "I will not sign a written document." However, the only fair import of the respondent's words is that there would be no written memoranda evidencing the conversation. The testimony of the officers at trial was based almost entirely on the writings made by the Wallingford Police allegedly memorializing the respondent's statements. (J.A. at 91A) Nothing respondent said can be fairly interpreted as limiting the scope of his request so narrowly as to preclude only his signature on a "legal document."

III. AT A MINIMUM, THE LIMITED SCOPE OF THE RESPONDENT'S REQUEST FOR COUNSEL WAS AMBIGUOUS.

While the respondent contends that the words "nothing in writing" mean just what they say, any argument by the petitioner to the effect that written police reports, including the statements of the respondent, were permissible can, at best, lead to the conclusion that the limitation on the scope of the request was ambiguous.

For example, did the respondent's request mean that the police could make a writing contemporaneous with the interrogation so long as they did not ask him to sign? Did it mean that, while no contemporaneous writing was

permitted, a writing memorializing the statements that the respondent made shortly after the interrogation was permitted? Did it mean that, while no writing was permitted, some other permanent record of the statement could be made (i.e. tape-recording)? In any event, it was a writing memorializing the statements of the respondent which enabled the officer to testify at trial. Certainly, this is one potential ramification of the statement that the respondent would have wanted to discuss with counsel.

While the respondent clearly requested counsel, this Court may determine that the limitations placed on the request rendered the request, or the scope of the request, ambiguous. The ramifications of an ambiguous request have yet to be determined by this Court.

In *Smith* v. *Illinois*, 105 S.Ct.490 (1984), this Court declined to determine precisely what the consequences of an ambiguous request for counsel should be. The Court, however, noted that lower courts have generally taken three approaches to the problem of an ambiguous or equivocal request for counsel. See *Smith*, *supra* at 493, footnote 3.

Some courts have held that all questioning must cease upon any request for counsel, however equivocal or ambiguous. *People* v. *Superior Court*, 542 P.2d 1390, 1394-1395 (Cal. 1975)*cert. denied* 429 U.S. 816 (1976); *People* v. *Rafac*, 364 N.E. 2d 991 (Ill. App. 3d 1977). Clearly, if this Court chooses to adopt this standard, then the statements of the respondent must be held to be inadmissible.

Other courts have attempted to define a threshold standard of clarity for such requests and have held that requests falling below this threshold do not trigger the right to counsel. See, e.g. *People* v. *Krueger*, *supra* at 540.

Even if the Court determines that this standard ought to be adopted, the respondent's statements meet any reasonable threshold standard of clarity. The respondent did not express doubt as to whether or not he wanted an attorney, as did the respondent in the *Krueger* case; rather, the respondent herein indicated he wanted and needed counsel to help him protect his rights against self-incrimination. The ambiguity, if any, is to be found not in his request for counsel, but in the scope of that request.

A growing number of courts have adopted a third approach to the effect that an equivocal or ambiguous request for counsel requires the cessation of all interrogation except for narrow questions designed to clarify the accused's desire for counsel. For example, in the case of *Thompson* v. *Wainwright*, 601 F.2d 768 (5th Cir. 1979), the Court held that, "whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject, and one subject only. *Further questions thereafter must be limited to clarifying that request* until it is clarified." *Thompson, supra*, at 771 (emphasis added). See also *United States* v. *Riggs*, 537 F.2d 1219 (4th Cir. 1976); *United States* v. *Prestigiacomo*, 504 F.Supp.681 (E.D.N.Y. 1981); *State* v. *Moulds*, 673 P. 2d 1074 (Idaho App. 1983); *Daniel* v. *State*, 644 P.2d 172 (Wyo. 1982).

In the case at bar. there was no attempt on the part of the Wallingford Police to clarify the request of the respondent or to explore his interest in having counsel. Rather, the Wallingford Police attempted to capitalize on the respondent's naivete and inexperience in dealing with the police by immediately taking an oral statement and then quickly reducing the statement to writing in their own reports. At one point, the Wallingford Police attempted to

change the respondent's mind with regard to giving a written statement. (J.A. at 98A) Indeed, the unsuccessful attempt to tape-record the respondent's statement without so informing him after the respondent indicated that he wanted to make no permanent record prior to speaking with counsel evidences an intentional disregard of the respondent's rights. Respondent, having expressed an interest in asserting his right to counsel was entitled to a cessation of all questioning except at a minimum those questions which narrowly attempted to clarify his request.

In the *Brief of Amici Curiae*, it is argued that upholding the respondent's position could result in an innocent defendant being imprisoned in his own rights. See *Brief of Amici Curiae Alaska, et al.*, 11-13. This is not a fair argument. The respondent does not contend that there can be no valid waiver of his rights. The respondent only contends that if the request is ambiguous or the scope of the request is ambiguous, then the law enforcement officers have a duty to clarify that request prior to proceeding with any interrogation. Moreover, if the right to counsel is invoked, that right can be waived by a criminal defendant so long as the criminal defendant is the initiator of subsequent conversations.

IV. THE CONNECTICUT SUPREME COURT DECISION PROPERLY MAINTAINS THE BALANCE BETWEEN THE COMPETING INTERESTS OF PROTECTING AN ACCUSED'S RIGHTS AND OBTAINING EVIDENCE FROM THE ACCUSED.

Recent decsions of this Court regarding Fifth Amendment rights have focused on the purposes and goals of the *Miranda* and *Edwards* decisions. This Court has recognized the need to balance the protection of an accused's rights under the Fifth Amendment against the legitimate

interests of law enforcement officers in attempting to solve crimes. See *Moran* v. *Burbine*, 106 S.Ct.1135 (1986); *New York* v. *Quarles*, 467 U.S. 649 (1984).

It is submitted that to hold that the respondent in this case has not invoked his right to counsel would be to undermine the balance which has been created in previous decisions. The request of the respondent underscores the essence of an accused's right to counsel.

In the case at bar, the respondent knew and wanted counsel to assist him in the protection of his rights. The dichotomy that respondent drew between a written statement and an oral statement indicates an obvious lack of understanding of the police process. Indeed, this is precisely the type of distinction that an accused, such as the respondent, with no previous arrest record would need the assistance of counsel to draw.

Moreover, the petitioner's argument allows the law enforcement officer to interpret the respondent's request as narrowly as possible. It then allows the law enforcement officer to circumvent the intent and purpose of not only the respondent's request but of his constitutional right to counsel.

The petitioner's argument, rather than perpetuating the balance between an accused's constitutional rights and the legitimate interests of law enforcement officers, encourages law enforcement officers to circumvent a request which is legitimately intended by an accused to obtain for himself the assistance of counsel.

We urge this Court to maintain the balance which has always been at the heart of the *Miranda* decision. A ruling that allows law enforcement officers to capitalize on ambiguities or limitations in an accused's request for counsel does not honor that balance.

An accused, after invoking these rights either in a clear or ambiguous fashion, may of course waive those rights under *Edwards* if the accused initiates further conversations. The police, however, should not be insulated from their obligation to cease interrogation merely because an accused's request for counsel is less than all-encompassing.

V. THE STATEMENTS OF THE RESPONDENT WERE NOT VOLUNTARY.

While it was unnecessary for the Connecticut Supreme Court to reach the issue of voluntariness as a result of its ruling, it is submitted that the trial Court erred in determining that the statements of the defendant were voluntary.

An accused cannot waive his right to counsel or his right against self-incrimination unless under all of the facts and circumstances, that waiver is knowingly and intelligently made. *North Carolina* v. *Butler*, 441 U.S. 369 (1979); *Johnson* v. *Zerbst*, 304 U.S. 458 (1937). The trial Court, in its ruling, failed to discuss at least two important factors which it should have taken into account in determining whether or not the respondent knowingly and intelligently waived his right to counsel and his right against self-incrimination.

First, nowhere in the trial Court's ruling does it appear that the respondent's lack of experience in dealing with the police was considered. The record is clear that the officers knew that the respondent had never been arrested before, and yet this finding is notably lacking in the trial Court's ruling.

Moreover, the trial Court fails to give any consideration to the substantive significance of the respondent's distinc-

tion between an oral statement and a written statement. (J.A. at 70A, 71A) His statement indicates a lack of understanding of his rights and of the police process. The trial Court should have considered these factors and weighed them in connection with the other pertinent facts bearing on the voluntariness issue. The respondent had been in a physical altercation almost immediately before having been taken into custody. (TR. 238) The New Haven police officer who first approached him stated that he was "walking slowly, as if staggering." (TR. 238) The injuries to his eyes, face and hands were readily observable. The medical evidence indicated that the injury to the respondent's eye was a bi-lateral subconjunctive hemorrhage. (TR. 588). The respondent was offered no medical attention until after he had been interrogated on the morning of October 24, 1980 between the hours of 7:00 and 9:00 a.m. (J.A. at 29A) The respondent's physical injury was serious enough to require hospital treatment which he had received only after his statement had been taken. (J.A. at 29A) The respondent had been taken to a small room after having been awake all night and was confronted by three experienced police officers. (J.A. at 20A, 50A) His comment that he wanted to make no written statement without consulting with counsel was virtually ignored by those officers, at least with regard to its substantive significance.

It is submitted that on all facts, the trial Court erred in determining that the statements that were elicited were voluntary. At a minimum, the trial Court erred in failing to consider the lack of experience of the respondent in dealing with the police and the statements he made concerning the request for counsel in determining whether or not the respondent had knowingly and voluntarily waived his rights.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the Connecticut Supreme Court.

Respectfully submitted,

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No. 85-899

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In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT, PETITIONER

v.

WILLIAM BARRETT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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25pp

QUESTION PRESENTED

Whether, under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), police must immediately terminate a custodial interrogation when a suspect states that he will answer questions orally but will not make a written statement in the absence of an attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-899

STATE OF CONNECTICUT, PETITIONER

v.

WILLIAM BARRETT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question in this case is whether, under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), a custodial interrogation must immediately cease when a suspect states that he is willing to answer questions orally, but indicates that he will not make a written statement in the absence of an attorney. The Court's analysis and resolution of this question is likely to have a significant effect upon the conduct of federal law enforcement agents in receiving voluntary in-

culpatory statements, and upon the admission of such statements in federal prosecutions.

STATEMENT

1. The evidence at trial established that, on the evening of October 23, 1980, respondent and a companion sexually assaulted a young woman in Wallingford, Connecticut. Immediately after the assault, the victim contacted the New Haven police and identified respondent, a former neighbor, as one of the assailants. Respondent was taken into custody in New Haven later that evening and was transported to the Wallingford police station early the next morning. Pet. App. 3A-4A.

Shortly after respondent's arrival at the station, police twice informed him of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).[1] Pet. App. 6A; J.A. 6A, 9A, 19A, 70A, 74A, 77A-79A. On both occasions, respondent indicated that he understood his rights (*id.* at 12A, 70A; see *id.* at 130A) and signed forms reprinting the *Miranda* warnings (*id.* at 7A-8A, 10A, 23A, 70A, 74A, 79A). When asked whether he wanted to make a statement, respondent replied that "he would not give the police a[ny] written statement[s] [concerning the assault in the absence of counsel] but he had no problem in talking about the incident" (*id.* at 12A; see *id.* at 21A, 70A, 85A, 97A). With prompting from the police, respondent proceeded to make incriminating statements (see *id.* at 85A-88A). Respondent at no point indicated that he

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[1] Respondent also had been informed of his rights by the New Haven police when he first was taken into custody (Tr. 234, 255, 298).

wanted to terminate the questioning (*id.* at 13A, 14A, 85A).[2]

After the completion of this interview, police discovered that the tape recorder that was used to record the questioning had not functioned (Pet. App. 6A). Accordingly, they again advised respondent of his *Miranda* rights (*ibid.*; J.A. 30A, 39A, 48A-49A, 89A), and he again stated that he understood his rights (*id.* at 31A). As he had prior to the first interview, respondent again declared "that he was willing to talk about [the assault] verbally but he did not want to put anything in writing until his attorney came" (*id.* at 44A). Respondent then substantially repeated his statement (*id.* at 32A-33A, 45A, 56A, 102A).[3]

2. At trial, respondent sought to exclude testimony relating the substance of his incriminating oral statements.[4] He based his motion on the claim that he had invoked his right to counsel when he refused to give the police a written statement in the absence of an attorney. After conducting a suppression hearing, the trial court denied the motion. It found that respondent had been informed of his rights, had indicated that he understood them, had signed a standard

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[2] Respondent's statement took the form of a narrative account of the assault, with intermittent prompting or questioning by the police. While respondent occasionally ignored police questions and continued his narrative, he did not refuse to answer any of the questions. J.A. 24A, 101A.

[3] At the end of this second interview, the police asked respondent whether he would put his oral statement into writing. He refused to do so without the advice of counsel. Pet. App. 6A.

[4] This testimony evidently was based on statements made by respondent at both police interviews (see J.A. 99A-100A).

rights form, and had willingly spoken to the police. J.A. 70A. The court also concluded that respondent "certainly understood" his rights, noting that respondent was aware that he was under no obligation either to give a written statement in the absence of an attorney or to answer all the questions directed at him (*ibid.*). In light of those factors, the court held that respondent's oral statements were "willingly, knowingly and intelligently [made] after an effective knowledgeable waiver of his right to counsel" (*id.* at 71A). The statements accordingly were admitted at trial, and respondent was convicted of sexual assault, unlawful restraint, and a narcotics violation.

The Supreme Court of Connecticut reversed, holding the interrogation of respondent impermissible under *Miranda* and its progeny.[5] The court found that the relevant inquiry required it to make two determinations: "(1) whether the defendant had in fact invoked his right to counsel; and (2) if so, whether he subsequently waived it" (Pet. App. 5A).

In the court's view, respondent's declaration to police that he would not make a written statement in the absence of an attorney sufficed to "invoke" his right to counsel within the meaning of *Miranda*, and therefore to require that the questioning cease (Pet. App. 7A). The court also found it clear that "the police understood this request for counsel" (*ibid.*). And the court concluded (*id.* at 8A) that

> [t]he fact that [respondent] attached his request for counsel to the making of a written statement does not affect the outcome of this first step

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[5] The court noted (Pet. App. 5A n.3) that respondent had not raised any claim under the Connecticut constitution.

> of our inquiry. No particular form of words has ever been required to trigger an individual's fifth amendment protections; * * * nor have requests for counsel been narrowly construed. * * * [Respondent's] refusal to give a written statement without his attorney present was a clear request for the assistance of counsel to protect his rights in his dealings with the police. * * * Such a request continues to be constitutionally effective despite [respondent's] willingness to make oral statements.

The court then proceeded to the second stage of its analysis, inquiring whether respondent "subsequently waived the right he had invoked" (Pet. App. 9A). In the court's view, such a waiver may be found only if the defendant initiates a renewed discussion with the police after making his initial request for an attorney (*ibid.*; see *id.* at 11A). Here, the court found no evidence that, after declining to make a written statement in the absence of counsel, respondent "initiated the subsequent encounters with police which resulted in his incriminating statements. To the contrary, the evidence clearly established that the police had initiated the interrogations." *Ibid.* The court accordingly found respondent's incriminating statements inadmissible, and it remanded the case for a new trial.

SUMMARY OF ARGUMENT

This Court's holding in *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966), was grounded on the belief that "the process of in-custody interrogation * * * contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." To combat these pressures, the Court erected

a series of prophylactic procedural rules. It required that police, prior to interrogation, give suspects the now-familiar *Miranda* warnings. And the Court insisted that all questioning cease whenever the suspect "invokes" his right to remain silent or to request an attorney. When a suspect indicates that he wishes to remain silent, the Court explained, he "has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Id.* at 474. Similarly, the Court required the termination of questioning after the suspect requests counsel so as to forestall " 'badger[ing]' or 'overreaching' * * * [that] might otherwise wear down the accused." *Smith* v. *Illinois*, No. 84-5332 (Dec. 10, 1984), slip op. 7-8 (citation omitted).

The Supreme Court of Connecticut found these prophylactic rules applicable here, holding that respondent "invoked" his right to counsel within the meaning of *Miranda*—and thus required the police to terminate the interrogation immediately—when he declared that he would answer questions orally, but would not make a written statement in the absence of counsel. Nothing in *Miranda*, however, suggests that this sort of *limited* invocation of the right to counsel mandates the termination of *all* questioning. To the contrary, the Court has indicated that further questioning becomes inappropriate when the suspect "express[es] his desire to deal with the police *only* through counsel." *Edwards* v. *Arizona*, 451 U.S. 477, 484-485 (1981) (emphasis added). Respondent, of course, expressed no such desire here.

This conclusion—permitting the interrogation to continue when the suspect expresses reservations

about how he wishes questioning to proceed (reservations that are scrupulously respected) but does not fully invoke his *Miranda* rights—follows directly from the theory of *Miranda*. If the suspect is informed of and understands his rights, yet expresses no reluctance to answer the questions at issue, there is no reason to indulge in *Miranda*'s presumption that the answers to those questions "cannot be other than the product of compulsion." And when the suspect is at all times willing to speak in the absence of counsel, there obviously is no need to apply a rule intended to guard against coercive badgering that might "wear down the accused."

2. In holding that respondent had fully invoked his right to counsel, the Supreme Court of Connecticut noted only that requests for counsel should not be narrowly construed. But respondent's request was not an ambiguous one that arguably should have been read broadly to guarantee the kind of respect accorded an equivocal assertion of the Fifth Amendment privilege. The meaning of respondent's limited invocation of the right to counsel was entirely clear—albeit narrow—and it left no doubt about his willingness to answer questions orally in the absence of an attorney.

If the Connecticut court's holding instead is read to express the theory that, once a suspect recognizes the value of the assistance of counsel in *some* of his dealings with the police, the courts must gratuitously insist that *all* questioning cease unless an attorney is present, it also is insupportable. Whatever tactical advantages a suspect supposes to exist in his decision to speak in the absence of counsel, neither the courts nor the police are obligated to safeguard the suspect's interests more fully than the suspect himself has thought necessary. Nothing in *Miranda* assumes or

seeks to guarantee that suspects will act wisely in their dealings with law enforcement authorities. *Miranda*'s rules ensure only that the accused will not be compelled to confess by the atmosphere of in-custody interrogation. By ignoring that single purpose, the holding of the Supreme Court of Connecticut "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975).

ARGUMENT

RESPONDENT DID NOT INVOKE HIS RIGHT TO COUNSEL PRIOR TO MAKING INCULPATORY STATEMENTS

It is common ground that, under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), law enforcement officers must inform a suspect that he has the right to remain silent or to request the presence of an attorney before he is subjected to custodial interrogation. See, *e.g.*, *id.* at 473-474; *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 6. It is similarly beyond dispute that an in-custody interrogation must cease once the suspect "invokes" his right to remain silent or to the assistance of counsel by affirmatively asserting those rights. See, *e.g.*, *Miranda*, 384 U.S. at 473; *Smith* v. *Illinois*, No. 84-5332 (Dec. 10, 1984), slip op. 4-5. The narrow question in this case is whether a suspect should be deemed to have invoked these *Miranda* rights for all purposes—thus immediately cutting off further interrogation—when he indicated that he was willing to answer questions orally, but not to make a written statement, in the absence of counsel. The Supreme Court of Connecticut's answer to this question, which requires the termination of a

custodial interview even when the suspect has expressed no reluctance whatsoever to speak to the police in the absence of counsel, cannot be reconciled with either the language or the purposes of *Miranda*.

1. The Court's holding in *Miranda* was grounded on the understanding that "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (384 U.S. at 467; see *Moran*, slip op. 6). The requirement that police give suspects the now-familiar *Miranda* warnings prior to interrogation was intended "[t]o combat this inherent compulsion" (*Moran*, slip op. 6) by assuring that suspects are "effectively apprised of their rights," and thus are placed in a position "permit[ting] a full opportunity to exercise the privilege against self-incrimination." *Miranda*, 384 U.S. at 467. See also *Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985), slip op. 12.[6] If law enforcement officers fail to warn the suspect of his right to remain silent or to request the presence of an attorney, or fail to obtain a valid waiver of these rights from the suspect, statements made by the suspect in response to police interrogation may not be admitted into evidence. *Moran*, slip op. 6.

The Court also has looked to the presumptively coercive nature of custodial interrogation in creating other prophylactic rules governing the admissibility of statements made by suspects. In particular, the Court has held that all questioning must cease when-

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[6] "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has [the] right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

ever the suspect "invokes" his right to remain silent or to request counsel. When a suspect indicates that he wishes to remain silent, the Court has explained, he "has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Miranda*, 384 U.S. at 474. Similarly, the Court has enunciated a " 'bright-line rule' that *all* questioning must cease after an accused requests counsel" (*Smith*, slip op. 7 (emphasis in original)), unless the suspect himself initiates subsequent discussions with the police. See *id.* at 4-5; *Edwards* v. *Arizona*, 451 U.S. 477 (1981). The Court has reasoned that, "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance" (*Smith*, slip op. 7-8 (citation omitted)). See *id.* at 8-9 n.8; *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion). See also *Michigan* v. *Mosley*, 423 U.S. 96, 105-106 (1975).

2. The Supreme Court of Connecticut found this "bright-line rule" applicable here. In the court's view, respondent "invoked" his right to counsel within the meaning of *Miranda*, *Edwards*, and *Smith* when he stated that he would answer questions orally, but would not make a written statement in the absence of counsel. This invocation, the court held, required the police to terminate the interrogation immediately.

In reaching this conclusion, however, the court attributed no significance to what respondent actually told the police. When asked whether he would waive his privilege against compulsory self-incrimination,

respondent replied that "he would not give the police any written statements but he had no problem in talking" (J.A. 12A; see *id.* at 44A). Nothing in *Miranda* suggests that this sort of *limited* invocation of the right to counsel requires the termination of *all* questioning. "While a general request for counsel indicates an unwillingness to submit to any further questioning," a request for the assistance of counsel only during certain portions of the interrogation hardly "itself indicate[s] such an unwillingness." *Stumes* v. *Solem*, 752 F.2d 317, 320-321 (8th Cir.), cert. denied, No. 84-6358 (Apr. 29, 1985). To the contrary, *Miranda* in terms mandates cessation of the interrogation only when the accused "indicates that he wants [an attorney] *before speaking to police*" (384 U.S. at 474 (emphasis added); see *id.* at 444-445). The Court's more recent decisions in the area likewise have indicated that further questioning becomes inappropriate when the suspect "express[es] his desire to deal with the police *only* through counsel." *Edwards*, 451 U.S. at 484-485 (emphasis added). See *Smith*, slip op. 4. And the Court has made it clear that a suspect's refusal to answer particular questions is "not [an] assertion[] of his right to remain silent" because such a refusal does not amount to a request to terminate the interview altogether. *Fare* v. *Michael C.*, 442 U.S. 707, 727 (1979).

The lower courts uniformly agree, moreover, that a suspect does not fully invoke his right to remain silent or to have the assistance of counsel when he refuses to answer certain questions, or when he agrees to make an oral but not a written statement. A limited invocation of the right to remain silent therefore does not require that the interrogation cease altogether. See *Stumes*, 752 F.2d at 320-321; *United*

States v. *Jardina*, 747 F.2d 945, 949 (5th Cir. 1984), cert. denied, No. 84-6232 (Mar. 18, 1985); *Harris* v. *Riddle*, 551 F.2d 936, 938-939 (4th Cir.), cert. denied, 434 U.S. 849 (1977); *United States* v. *Frazier*, 476 F.2d 891, 899 (D.C. Cir. 1973) (en banc); *United States* v. *Cooper*, 499 F.2d 1060, 1062 (D.C. Cir. 1974); *Pettyjohn* v. *United States*, 419 F.2d 651, 655 (D.C. Cir. 1969), cert. denied, 397 U.S. 1058 (1970); *State* v. *Jones*, 125 N.H. 490, 493-494, 484 A.2d 1070, 1073 (1984). Thus, if a suspect, after being fully advised of his *Miranda* rights, agrees to speak with one officer but not another, or agrees to answer questions about one offense but not another, or agrees to speak only if his statement is not recorded, the police are not required to disregard the suspect's decision and treat his limited waiver as a full-scale invocation of his right to remain silent for all purposes and on all subjects. See, *e.g.*, *United States* v. *Thierman*, 678 F.2d 1331, 1335 (9th Cir. 1982). So long as the police respect the terms on which the suspect has agreed to speak, and so long as they do not try to inveigle him into expanding the scope of his waiver, the products of the restricted interrogation to which the suspect has consented should be fully admissible at trial.

There is nothing surprising or anomalous in this approach to the invocation of *Miranda* rights. The theory of *Miranda* is that "full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process." *Moran*, slip op. 13. Once the suspect is armed with knowledge of these rights, his choice whether to exercise his privilege to remain silent should ordinarily be viewed as an " 'act of free will.' " *Elstad*, slip op. 12 (citation omitted). See *United States* v. *Washington*, 431 U.S. 181, 188

(1977). That reasoning is wholly applicable in a case, such as this one, where the suspect invokes his *Miranda* rights only to a limited extent and otherwise chooses to continue his dialogue with the police. If the suspect is informed of and understands his rights, yet expresses no reluctance to answer the questions at issue, there is no reason to indulge in *Miranda*'s presumption that his answers to those questions "cannot be other than the product of compulsion" (384 U.S. at 474). And when the suspect is at all times willing to speak, there obviously is no need to apply a rule intended to guard against coercive badgering that might "wear down the accused" (*Smith*, slip op. 7-8).

3. In rejecting this analysis, the Supreme Court of Connecticut simply failed to consider the policies that underlie *Miranda*, and accordingly failed to ask the question that is central in any *Miranda* challenge: "whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979). Instead, the Court noted only that requests for counsel should not be "narrowly construed" (Pet. App. 8A), and based its holding on the belief that respondent's limited invocation of his right to an attorney was appropriately viewed as a general request for the assistance of counsel in protecting *all* of "his rights in his dealings with the police" (*ibid.*). But respondent's request was not an ambiguous one that arguably should have been construed broadly to guarantee respect for an equivocal assertion of the Fifth Amendment privilege. Cf. *Smith*, slip op. 5 & n.3. The meaning of his limited invocation of the right to counsel was entirely clear—albeit narrow—and it left no doubt about his willingness to answer questions orally in the absence of an attorney.

Similarly, if the Connecticut court's holding is read to express the theory that, once a suspect recognizes the value of the assistance of counsel in some of his dealings with the police, *all* questioning must cease unless an attorney is present, it remains insupportable. Whatever the tactical merits of a suspect's decision to speak to the police in the absence of counsel, neither the courts nor the police are obligated to safeguard the suspect's interests more fully than the suspect himself has thought necessary. See *Moran*, slip op. 19 n.37. *Miranda*'s affirmative purpose was neither to make interrogations impossible nor to discourage truly voluntary confessions. As the Court repeatedly has noted, " 'far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable.' " *Elstad*, slip op. 6 (quoting *Washington*, 431 U.S. at 187). See *Moran*, slip op. 12; *New York* v. *Quarles*, 467 U.S. 649, 654 (1984). *Miranda*'s rules ensure only that such admissions by suspects are not coerced.

It follows from this rationale, of course, that *Miranda* does not guarantee that suspects will act in their own best interests in their dealings with police. That conclusion is implicit in the Court's consistent judgment that—despite the undeniable and often-acknowledged value of an attorney in protecting the interests of a suspect during custodial interrogation, see, *e.g.*, *Miranda*, 384 U.S. at 470; *Michael C.*, 442 U.S. at 719, 722—a lawyer need not be present at every interrogation, and that the right to the assistance of counsel may be waived even after it has been invoked. See, *e.g.*, *Moran*, slip op. 12; *Wyrick* v. *Fields*, 459 U.S. 42, 46 (1982); *Edwards*, 451 U.S. at 485-486 & n.9. Indeed, the Court has held explicitly that law enforcement agents are under no obligation to remind or inform suspects of all of the

considerations, either legal or factual, that bear on the wisdom of a waiver decision. See *Moran*, slip op. 11; *Elstad*, slip op. 17.[7]

The Court thus consistently has "rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case," reasoning that creating such a rule "would be to 'imprison a man in his privileges,' *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 280 (1942), and to disregard 'that respect for the individual which is the lifeblood of the law,' *Faretta* v. *California*, [422 U.S. 806,] 834 [(1975)]." *Mosley*, 423 U.S. at 109 (footnote omitted) (White, J., concurring in the result). Taking such a tack would also entirely disregard *Miranda*'s "explicitly stated rationale" (*Beckwith* v. *United States*, 425 U.S. 341, 345 (1976)), rooted in the Fifth Amendment's privilege against compulsory self-incrimination, which rests on the proposition that a recitation of the *Miranda* rights is necessary simply to prevent the suspect's will from being overborne. By departing from this central inquiry into voluntariness, the Connecticut court's holding "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Mosley*, 423 U.S. at 102. See *Moran*, slip op. 11.

In addition to disregarding the touchstone of voluntariness, the Connecticut court's refusal to recognize

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[7] "[T]he test is not whether [the suspect] made an intelligent decision in the sense that it was wise or smart to admit his participation in the crime, but whether his decision was made with the full understanding that he need say nothing at all and that he might then consult with a lawyer if he so desired." *United States* v. *Hall*, 396 F.2d 841, 846 (4th Cir.), cert. denied, 393 U.S. 918 (1968).

a limited waiver could generate substantial confusion in an area in which clear rules are essential. See *Moran*, slip op. 11; *Michael C.*, 442 U.S. at 718. Under the Connecticut court's analysis, for example, it is not clear whether a suspect could be interviewed if he agreed to talk to the police without counsel, but indicated that he would like the assistance of counsel at trial or at some later point in the proceedings. Compare *Nash* v. *Estelle*, 597 F.2d 513, 518 (5th Cir.) (en banc), cert. denied, 444 U.S. 981 (1979) (no bar to interrogation if police determine that suspect wishes to invoke counsel for later stages of the criminal process, but not during questioning). Thus, the Connecticut rule would appear to make virtually any request for the assistance of counsel, no matter how clearly restricted to a context other than the interrogation, sufficient to require that the questioning cease. Because the police could not act in reliance on the terms of the waiver set out by the suspect himself, they would be left to speculate about whether a particular reference to counsel would likely be construed as an oblique—but sufficient—invocation of the suspect's right to counsel during interrogation.

4. When respondent stated that "he would not give the police any written statements but he had no problem in talking about the [assault]," he affirmatively indicated that he did not seek the presence of counsel prior to answering questions; his inculpatory remarks accordingly should not have been treated as the presumptive product of compulsion. In these circumstances, the proper inquiry governing the admissibility of respondent's statements—an inquiry that was not undertaken by the Supreme Court of Connecticut—involves the determination whether respondent's partial waiver of his Fifth Amendment privi-

lege was voluntarily, knowingly, and intelligently made. As the Court repeatedly has explained, this determination depends upon the particular facts and circumstances surrounding the case. *Bradshaw*, 462 U.S. at 1046 (plurality opinion); *Butler*, 441 U.S. at 374-375; see also *Edwards*, 451 U.S. at 482; *Michael C.*, 442 U.S. at 724-725.

The answer to that inquiry is plain on the record here. There is no doubt that respondent was informed of his *Miranda* rights. Moreover, he testified at trial (J.A. 130A), and the trial court found (*id.* at 70A), that he understood those rights. The trial court also determined (*id.* at 71A) that no threats or coercive tactics were used to extract respondent's statement. And the questioning of respondent by police "was restrained and free from the abuses that so concerned the Court in *Miranda*." *Michael C.*, 442 U.S. at 727. Given these considerations, the trial court was clearly correct in ruling in favor of the admissibility of respondent's statement. Compare *Bradshaw*, 462 U.S. at 1046-1047.[8]

It may be added that the record here leaves no room for an assertion that respondent failed to understand that an oral, as opposed to a written, statement could be used against him at trial. In his pleadings below, respondent at no point suggested any such lack of understanding. In any event, as the Court has

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[8] In holding that respondent had invoked his *Miranda* rights, the Supreme Court of Connecticut declared that the trial court "impliedly found that the defendant had requested counsel" (Pet. App. 7A (footnote omitted)). The trial court, however, never held that respondent had "invoked" his right to counsel; it simply noted in passing that respondent had expressed unwillingness to give a written statement in the absence of an attorney (see J.A. 70A).

suggested in a somewhat different context (*Washington*, 431 U.S. at 188), it seems "inconceivable that [a *Miranda*] warning would fail to alert" a suspect to the fact that, if he chooses to speak, "anything [he] say[s] can and will be used against [him] in court" (J.A. 48A). Cf. *Kennedy* v. *Fairman*, 618 F.2d 1242, 1248 (7th Cir. 1980). And as the courts of appeals have noted, a suspect's refusal to make a written statement hardly compels the conclusion that he believed his oral remarks to be inadmissible: "It is * * * a common experience of life that in many circumstances persons are willing to convey information orally but are reluctant to put the same thing in writing." *Cooper*, 499 F.2d at 1062. See *Harris*, 551 F.2d at 938; *Frazier*, 476 F.2d at 898 & n.7. Certainly, the police should not have been required to advise respondent that an oral statement could be nearly as damaging at trial as a written one. Cf. *Elstad*, slip op. 17-18 (police not required to advise suspect that his prior statement could not be used against him, even though without that information he may not have been aware of the "full consequences" of his decision to speak to the police).[9]

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[9] Indeed, a number of courts have held confessions to be admissible even where the suspect affirmatively "indicate[d] a misapprehension of [the] law," finding that "*Miranda* does not put upon the police the burden of explaining the rules of evidence and the substantive criminal law." *Harris*, 551 F.2d at 938. Those courts have reasoned that a suspect makes an intelligent waiver whenever he chooses "to speak with the knowledge that he could keep silent or have counsel present while he talked. * * * It is wholly irrelevant that the decision to talk turns out to be wise or foolish, or that the decision is the result of poor cerebration or misinformation as to the law and/or the facts." *Id.* at 939. Accord, *State* v. *Jones*, 125 N.H. 490, 493-494, 484 A.2d 1070, 1071, 1073 (N.H. 1984); *State* v.

There accordingly were no grounds in this case for the suppression of respondent's statement.

CONCLUSION

The judgment of the Supreme Court of Connecticut should be reversed.

Respectfully submitted.

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JULY 1986

McKnight, 52 N.J. 35, 54-55, 243 A.2d 240, 251 (1968). Cf. *People* v. *Williams*, 62 N.Y.2d 285, 465 N.E.2d 327, 329 (1984). See generally, *Elstad*, slip op. 18 ("we have not held that the *sine qua non* for a knowing and intelligent waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case").

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NO. 85-899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF CONNECTICUT,

Petitioner,

V.

WILLIAM BARRETT,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Connecticut

BRIEF OF AMICI CURIAE, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA, WASHINGTON, AND WISCONSIN*

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are states, each of which has an interest in the present case because of its effect upon the consistent enforcement of the criminal law. When officers are prevented from discussing alleged offenses in a noncoercive manner with willing suspects, the result is that proper criminal investigation is discouraged. Particularly when, as in this case, suspects protesting their innocence indicate willingness to speak with officers to demonstrate that they should be released, the result could even be that the release of innocent suspects would be delayed or impeded. Furthermore, the exclusion of evidence in the form of voluntary and uncoerced statements of a suspect brings the criminal justice system into public disrespect. Amici urge the Court to reverse the decision below and to clarify its previous decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), to prevent these results.

SUMMARY OF ARGUMENT

The defendant in this case spontaneously and voluntarily defined the kind of discussions he wanted to hold with the offi-

cers in question. The evidence leaves no question that he understood his rights and quite deliberately discussed the case with officers because he wanted to argue his innocence. His declaration that he would not sign a written statement without an attorney shows that he was fully able to assert his right to counsel as well as his right to withhold any statement. In characterizing this evidence as showing coercion, the Connecticut Supreme Court had it backwards; instead, the evidence convincingly shows voluntariness.

The decision below resulted from a confused interpretation of *Edwards v. Arizona*. The focus, under *Edwards*, should not be solely upon who initiated discussions or solely upon whether the defendant mentioned the word "attorney;" it should also concern itself with whether the officers somehow overrode defendant's conscious will by coercive questioning or badgering. The consistent thread that runs through *Edwards* and all of its progeny is a focus upon whether there was persistent questioning that overrode the suspect's will. In this case, the officers did nothing to override the defendant's will, did nothing coercive, and did nothing that could conceivably be characterized as badgering. In the absence of compulsion of any kind by the officers, there can be no fifth amendment violation, and *Edwards* is not to the contrary.

The Court should take this opportunity to clarify *Edwards* and to state that the *Edwards* inquiry cannot be reduced to any one single factor to the exclusion of all others. The admittance of the defendant's statement in this case is fully consistent with *Edwards*, but confusion over interpretations of the *Edwards* holding has produced anomalous results in this case and in others. There is conflict in this Court's decisions concerning the "bright line" or "per se" nature of the *Edwards* holding, and there is even more confusion concerning the factors to be considered in deciding whether and how to apply a "bright line" approach if one is to be used.

Holdings such as that of the Connecticut Supreme Court in this case are not merely confused, they are counterproductive. It is inappropriate to tell officers, as the Connecticut court did,

that they may not discuss charges with a suspect who speaks willingly and who protests his innocence. Demonstrations of innocence by arrested suspects can readily speed their release. In fact, if an officer refuses to listen to a suspect's protestations of innocence and merely returns him to a cell (as the Connecticut court evidently concluded these officers should have done), he might very well be vulnerable to suit under 28 U.S.C. sec. 1983. In any event, law enforcement officers should not be required or encouraged to adopt this behavior, because it presents an unacceptable risk that incarceration of factually innocent suspects may be unnecessarily prolonged.

ARGUMENT AND AUTHORITIES

I. THE FOCUS, IN AN *EDWARDS V. ARIZONA* INQUIRY, SHOULD NOT BE SOLELY UPON WHO INITIATED DISCUSSIONS OR UPON WHETHER DEFENDANT EQUIVOCALLY MENTIONED COUNSEL, BUT SHOULD ALSO CONCERN ITSELF WITH WHETHER LAW ENFORCEMENT OFFICERS OVERRODE DEFENDANT'S CONSCIOUS WILL BY COERCIVE QUESTIONING OR BADGERING.

A. It is a Misinterpretation of Edwards to Hold, as Did the Court Below, That a Suspect Who Has Spontaneously and Voluntarily Defined the Kind of Discussions He Desires to Undertake With Law Enforcement Officers, Has Been "Compelled . . . to Be a Witness Against Himself."

Misinterpretation of *Edwards v. Arizona* can easily lead to irrational results. The decision of the Connecticut Supreme Court in the present case is an example.

In this case, the Defendant clearly and unequivocally indicated that although he would not sign a written statement without an attorney, he was fully willing to discuss the alleged offense with officers orally. (In fact, defendant clearly desired to make these statements, which after all were designed to exonerate him and secure his release.) When a defendant, him-

self, has voluntarily and spontaneously structured the method of communication he wishes to undertake with law enforcement officers, and has exercised his voluntary, conscious will to distinguish between different kinds of communication, his conduct is not evidence that he has been "compelled . . . to be a witness against himself" within the meaning of the fifth amendment. Instead, it is evidence of voluntariness.

The topsy-turvy nature of the Connecticut Supreme Court's reasoning is shown by its references to Defendant's mention of an attorney. Defendant's reference to his right to counsel was not evidence that he was psychologically "coerced" into making a statement; instead, it was evidence of his awareness of the right. *Cf. Wyrick v. Fields*, 103 S. Ct. 394 (1982) (fact that defendant not only had invoked his right to counsel, but actually had retained counsel, should be taken into account in determining that defendant "understood that right and was aware of his power to stop questioning at any time or to speak to an attorney at any time"). Furthermore, Defendant Barrett's actual exercise of his right not to give a certain kind of statement (i.e., a written statement) is not an indication that his oral statements were "compelled." Instead, as in *Wyrick*, it was strong evidence that he understood his right to terminate or withhold any kind of statement and that his suggestion of oral discussions was voluntary.

Finally, the Connecticut Supreme Court's labeling of Defendant's reference to an attorney as "equivocal" is at odds with reality. Defendant's statement, that he would talk orally but would not sign a written statement, was not "equivocal" at all. With crystalline clarity, Defendant indicated that he understood and was invoking his right not to make a written statement until he had an attorney, but was willing to make an oral statement without an attorney. Again, Defendant's behavior is evidence not of compulsion, but of understanding, voluntariness, noncoercion, and the exercise of conscious will.

Indeed, it would be ironic if this Defendant's statement were excluded merely because he mentioned an attorney in another context while giving his waiver with respect to oral state-

ments, while the statement of another defendant might be admitted, merely because he did not furnish the same evidence that he was aware of and able to invoke his rights. The Connecticut Supreme Court perceived what is actually evidence of voluntariness as evidence of coercion. The Connecticut court reached this backwards result by focusing solely upon a superficial view of two factors (the mention of the word "attorney" and the locus of initiation of conversations) to the exclusion of other, more significant factors.

This unrealistic reasoning, in turn, was the product of the Connecticut court's confused understanding of *Edwards v. Arizona*. This Court should take this opportunity to clarify *Edwards* and to indicate that the decision does not require a court to isolate any single factor, or to insulate itself from considering all other relevant factors, when inquiring into voluntariness.

B. A Focus Solely Upon Whether Reference to Counsel Was "Equivocal," or Upon the Locus of "Initiation" of Discussions by a Suspect With Law Enforcement Officers, Would Produce Inconsistent and Misleading Results, if It Excluded Other Factors That Sometimes Are More Determinative.

Imagine a suspect who is given *Miranda* warnings, and who immediately says: "I don't think I want an attorney, and I want to waive my rights." He then proceeds to give a detailed statement of the circumstances of his offense, not prompted by any police questioning. This confession would not be "involuntary." However, the Connecticut Court's approach would label the suspect's statement, "I don't *think* I want an attorney," as equivocal, and it would presumably result in the irrational exclusion of this evidence.

Determining whether a suspect's mention of counsel was "equivocal" is itself an ambiguous process. Indeed, in the present case, it is respectfully submitted that defendant's waiver of counsel in giving an oral statement was not equivocal at all; instead, it was as nearly as unequivocal as it is to be found in these circumstances. If the suspect were to say, "I guess I don't

need an attorney;" or even "I don't suppose an attorney would really do me any good," each of these remarks arguably would be equivocal, but it would make no sense to decide the voluntariness of his subsequent statements without considering any other factor. Neither *Edwards v. Arizona*, 451 U.S. 477 (1981), nor any of this Court's decisions following it, requires such a straightjacketed approach.

Similarly, a narrow inquiry into which party "initiated" discussions, excluding other factors, would be inappropriate. In the present case, for example, the Defendant mentioned his right to counsel in connection with written statements, but the Defendant then "initiated" oral discussions with the officers by indicating, quite clearly, that he was willing to talk with them. The Connecticut Supreme Court ignored this actual initiation of the discussions by the suspect, and this distorted reasoning exemplifies the confusion that can be produced by an effort to isolate the "initiation" factor. In none of the cases, *Edwards v. Arizona* or its progeny, has this Court ever held that the "initiation" factor must be considered in isolation.

In fact, the Defendant's mention of counsel (whether equivocal or unequivocal), and the question of who initiated discussions, are relevant not solely for their own sake, but because they may bear upon the question whether law enforcement officers have overridden the defendant's conscious will so as to "compel" him to be a witness against himself. In all of this Court's decisions following *Edwards*, the true focus has been upon the presence or absence of coercive questioning by law enforcement officers. The Defendant's mention of counsel on the one hand, or initiation of discussions on the other, is relevant because it provides the context in which police conduct is to be considered. If the suspect says that he wants to speak solely through an attorney, but officers ignore that statement and persist in badgering him with questions, their behavior is likely to be found coercive. This description, however, does not fit the present case at all, since there was no coercive questioning.

C. The Consistent Thread in Edwards v. Arizona and All Its Progeny is a Focus Upon Whether Law Enforcement

Officers Overrode Defendant's Efforts to Invoke the Fifth Amendment by Badgering or Coercive Questioning.

Edwards v. Arizona, supra, is completely different from the present case. In *Edwards*, the defendant demanded an attorney, whereupon questioning ceased. The next morning, he was told that he "had to" talk to detectives, even though he had said that "he did not want to talk to anyone." This Court said:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation . . . . we further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation . . . unless the accused himself initiates further communication . . . .

451 U.S. at 484-85. The gist of *Edwards*, in other words, is that even though the defendant had indicated that he did not want to talk to police except through counsel, and even though he had further stated that he did not want to talk "to anyone," the officers overrode these clearly expressed desires and engaged in coercive questioning, or badgering, of the suspect.

In the present case there is no relationship to those circumstances. This Defendant, Barrett, never "invoked his right to have counsel present during custodial interrogation," as in *Edwards*, 451 U.S. at 477. Certainly, he never "expressed his desire to deal with the police only through counsel." On the contrary, he voluntarily and spontaneously indicated that he affirmatively was willing to deal with these officers by orally discussing the alleged offense with them. Furthermore, no one told Barrett that he "had to" talk to anyone. Defendant was never badgered, Defendant was never coerced, and there is no basis whatsoever for stating that Defendant was "compelled to be a witness against himself."

The consistent thread that runs through *Edwards* and all of its progeny, including *Smith v. Illinois*, 105 S. Ct. 490 (1984); *Solem v. Stumes*, 104 S. Ct. 1338 (1984); *Oregon v. Bradshaw*, 103 S. Ct. 2830 (1983); and *Wyrick v. Fields*, *supra*, is a focus upon the presence or absence of persistent, badgering police questioning that has overridden expressed desires of the suspect and arguably overcome the suspect's conscious will. In *Smith v. Illinois*, the suspect repeatedly told officers that he would like to have a lawyer present during questioning; the officers continued to interrogate him, and stated that he would "have to talk to me [the interrogator] this time without a lawyer being present . . . ." In *Solem v. Stumes*, *supra*, the defendant on two occasions stated that he would "rather not" talk about the subject any further "until I talk to [my attorney]." The Court's implicit finding of an *Edwards* violation was based upon the officer's continued questioning, which each time was resumed, overriding the defendant's clear statement that he did not want to talk at all. 104 S. Ct. at 1340-41. In *Wyrick v. Fields*, 103 S. Ct. 396-97, the Court reached the opposite result because the officers never overrode the conscious will of the suspect, who knew that he could terminate questioning at any time and request that his lawyer join him; the police questioning, said the Court, was "reasonable." Finally, in *Oregon v. Bradshaw*, 103 S. Ct. at 2835, the Court emphasized the lower court's finding "that the police made no threats, promises or inducements to talk," and that the defendant talked "without any impropriety on the part of the police." In summary, in every case,[1] the *Edwards* inquiry focused not solely upon the suspect's mention of the word "attorney" or initiation of discussions, but additionally—indeed, primarily—upon whether there was police badgering or other tactics that overrode defendant's expressed desires not to talk. That improper behavior is utterly absent in this case.

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1 *Michigan v. Jackson*, 106 S. Ct. 1404 (1986), is related to this line of cases, but presented a different issue. As a post-indictment case, it involved a pending formal accusation rather than a mere investigation, and more importantly, since the defendant actually had obtained counsel, the Court indicated that the circumstances made a different, and stronger, case for suppression.

It is unclear whether *Edwards* creates a "per se" rule. The cases make inconsistent statements. *E.g.*, *Wyrick*, 103 S. Ct. at 396 (examination of "totality of the circumstances" required by *Edwards*; Court criticized lower court for having "regarded [*Edwards*] as a *per se* rule"); *Bradshaw*, 103 S. Ct. 2835 ("ambiguous" actions of suspect invoked "totality of the circumstances" test, including focus on lack of police inducements); *Solem*, 104 S. Ct. at 1344 (*Edwards* "established a bright-line rule," but "it does not in any way cast doubt on . . . . *Edwards* to acknowledge that in some cases a waiver could be [valid] even though it occurred when the police recommenced questioning after an accused had invoked the right to counsel"); *Smith*, 105 S. Ct. at 494-495 ("bright-line rule;" but decision "is a narrow one," and does not address "ambiguous or equivocal" requests for counsel as a "result of events preceding the request or of nuances inherent in the request itself").

The weight of the better reasoning in the cases does not indicate a per se rule.[2] However, whether per se or not, the cases clearly do not require the invalidation of voluntary statements given without police badgering, ignoring requests to stop questioning, statements that the accused "had to" talk, or other conduct that overrode the suspect's will. Absent this kind of improper police questioning, there cannot be any violation of *Edwards*.

Defendant Barrett's approach to these issues is a "magic words" approach. That approach is inappropriate because the inquiry is ultimately whether he was "compelled" to be a witness against himself. The inquiry is therefore whether his conscious will was overcome by coercion. In *Oregon v. Elstad*, 105 S. Ct. 1285, 1295 (1985), the Court said: "There is vast difference between the direct consequences flowing from coercion of a confession by . . . deliberate means calculated to break the

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2 In addition, since these decisions, this Court has cited with approval the concurrence of Justice Powell in *Edwards*. The cited passage is to the effect that *Edwards* should *not* be considered a per se rule. *See infra* note 3 and accompanying text.

suspect's will and [noncoercive communication] . . . ." "The fifth amendment, of course, is not concerned . . . with moral and psychological pressures to confess emanating from sources other than official coercion." *Id.* at 1291. In both *Elstad*, 105 S. Ct. at 1291, and *New York v. Quarles*, 104 S. Ct. 2626 (1984), the Court cited a passage from Justice Powell's concurrence in *Edwards v. Arizona* that includes the following:

> 'Waiver has always been evaluated under the general formulation of the *Zerbst* [*Johnson v. Zerbst*, 304 U.S. 458 (1938)] standard . . . . My concern is that the Court's opinion [in *Edwards*] today may be read as "constitutionalizing" not the general *Zerbst* standard but a *single element of fact* among the various facts that may be relevant to determining whether there has been a valid waiver.

451 U.S. at 492 (emphasis in original).[3] The citation of this passage in *Elstad* and *Quarles* shows the error in Defendant's "magic words" approach, and indicates that the Court has not taken a per se approach to *Edwards*.

This Court has repeatedly indicated that, in the absence of improper police conduct, confessions to law enforcement officers are not invalid. *E.g.*, *Moran v. Burbine*, 106 S. Ct. 1135 (1986) ("once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements . . . , the analysis is complete and the waiver is valid as a matter of law"). There can be no *Edwards* violation if the officers have avoided engaging in any coercive questioning, which they absolutely avoided in this case.

II. WHEN A SUSPECT PROTESTS HIS INNOCENCE, LAW ENFORCEMENT OFFICERS

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3 See *supra* note 2.

SHOULD NOT BE PROHIBITED FROM DISCUSSING THAT SUBJECT WITH HIM. IN FACT, SUCH A PROHIBITION WOULD DO SUBSTANTIAL HARM TO INNOCENT PERSONS WHO ARE ARRESTED.

A. *If Officers Were Prohibited From Participating in Noncoercive Discussions With a Suspect Who Willingly Speaks to Protest His Innocence, Merely Because of His Mention of the Word "Attorney," They Would Create an Unacceptable Risk of Holding Innocent Persons Whom They Should Release.*

Actually, the Defendant in this case wished to speak with the officers because he wanted to protest his innocence. The holding of the court below, however, was that at the mere mention of the word attorney, the officers should have ceased all discussions with him and, presumably, should have returned him to his cell. This conduct would have been inappropriate for the officers, who should not have terminated discussions with a suspect who professed his innocence, and, further, indicated that he wished to talk to police officers to show them he was innocent.

There is a substantial percentage of arrests that do not result in prosecution. It is not unusual for a suspect to be released because further investigation indicates his innocence (or at least produces sufficiently ambiguous evidence that prosecution is not justified). An arrestee can often contribute to the investigation that will remove the charges against him even if he has been arrested on probable cause, and he may be able to hasten his release by providing information showing his nonculpability. Yet by requiring that these officers cease all discussions with the accused in this case upon the mere mention of the word "attorney," the lower court created conditions that would, if upheld, require precisely this behavior of police officers.

It is likely that the officers in this case thought the balance of probabilities favored the suspect's guilt. However, an officer

learns from slight experience that he should continue to investigate the possibility of innocence even if initial leads show apparent guilt. It simply is not unusual for initial suspicion of guilt to prove inaccurate. *See, e.g.*, D. Crump & G. Jacobs, *Capital Murder* (1967) (reporting investigations of six homicide cases; in two of the six, initial positive identifications of suspects taken into custody were revealed to be based upon misidentifications; information provided to officers by the suspects themselves convincingly showed their innocence, and their voluntary statements led in both cases to their prompt release.) In several of the cases following *Edwards*, the statements at issue resulted because the officers were investigating claims of innocence by the defendants. *E.g., Solem v. Stumes, supra* (defendant denied involvement in homicide and was asked to take polygraph); *Wyrick v. Fields, supra* (defendant actually took polygraph examination on advice of counsel); and, of course, the present case.

This Court sees the results of these investigations only when the suspect is later convicted. It cannot know how many thousands of individuals every year are arrested on probable cause but later released as a result of discussions with officers just like those conducted by defendant in this case. The Court should not adopt a rule that would prevent that result.

B. The Law Enforcement Behavior Required by the Connecticut Supreme Court Could Amount to the Deprivation of a Factually Innocent Suspect's Civil Rights.

If police officers followed the opinion below, their behavior very well could subject them, personally, to damage liability to individuals wrongfully retained in custody. This suspect said, in effect, "I won't sign a statement without an attorney, but I do want to talk to you orally about the offense, and I want to demonstrate to you that I am innocent and should be released." The court below held that the officers should have terminated the interview upon receiving this message. If they had refused to discuss the matter with the suspect, and if they terminated interviews in these circumstances routinely, the officers would incur an unacceptable risk that they would hold an innocent

person because of their own intentional failure to receive evidence demonstrating his innocence. It would not be surprising if an innocent suspect, who had been held in jail for these reasons, sued the officers pursuant to 42 U.S.C. sec. 1983 for denying him the due process of law.

It may be that an officer sued under these circumstances would be able to defend on grounds that he had not violated the Constitution or had acted in good faith, but the outcome remains ambiguous. *Cf. Malley v. Briggs*, 106 S. Ct. 1092 (1986) (officers may be liable for unlawful search even though their search was ordered by a court in a warrant). In any event, as a matter of policy, officers should not be prohibited from discussing with suspects their protestations of innocence, provided they do not engage in coercion or override a suspect's request "to speak only through counsel."

CONCLUSION

The judgment of the Supreme Court of the State of Connecticut should be reversed.

Respectfully submitted,

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NO. 85-899

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE STATE OF CONNECTICUT,
Petitioner,

V.

WILLIAM BARRETT,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Connecticut

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, NATIONAL DISTRICT ATTORNEYS ASSOCIATION

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NO. 85-899

IN THE
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OCTOBER TERM, 1985

STATE OF CONNECTICUT,

Petitioner,

V.

WILLIAM BARRETT,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AN AMICUS CURIAE

The National District Attorneys Association ("NDAA") respectfully moves for leave to file the attached brief as amicus curiae. In support of its Motion, NDAA would show the court as follows:

1. *Interest of Amicus Curiae.* NDAA is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

2. *Specific Interest in the Case at Bar.* NDAA's members are continuously engaged in the litigation of criminal cases, including many cases presenting issues related to those in the case at bar. They would be affected directly in their statutory obligations if the reasoning of the court below were to be adopted here. Since NDAA's members appear in the trial courts to represent the states in these cases, NDAA may be able to assist the Court in developing the issues fully.

3. *Purpose of Amicus Curiae Brief.* NDAA's purpose, in this brief, is to analyze the case authority in ways that are not present in other briefs. Amicus curiae has communicated with counsel for Petitioner in an effort to avoid undue duplication. It is believed that this brief argues the issues in a manner that will not be done in Petitioner's brief.

4. *Public Importance of the Issues Addressed Here.* Since its decision in *Edwards v. Arizona,* this Court has addressed the issues it raised in several cases. A very large number of cases has been presented to the lower courts. The results have sometimes been anomalous. The decision of the Connecticut Supreme Court in this case is an example. There is great need of a clarification of the *Edwards* standard to avoid these anomalous results.

5. *Requests for Consent.* The consent of the Petitioner to the filing of this brief has been requested and granted. The consent of Respondent has been requested and refused. This Motion is therefore filed in accordance with the Rules of this Court.

FOR THESE REASONS, NDAA prays that it be granted leave to file the attached brief as amicus curiae.

Respectfully submitted,

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NO. 85-899

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF CONNECTICUT,

Petitioner,

V.

WILLIAM BARRETT,

Respondent.

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is set forth in paragraphs 1-2 of the Motion preceding this brief.

SUMMARY OF ARGUMENT

The opinion below holds that a criminal suspect's reply to police that he would not give a written statement without his attorney present, but that he was willing to answer questions orally, amounts to a request to have counsel present during subsequent oral discussions. Neither the Fifth and Fourteenth Amendments to the United States Constitution nor the decisions of this Court that were relied on by the Connecticut Supreme Court support such a conclusion. As is evident from the record, respondent Barrett, who was fully advised of his *Miranda* rights, never indicated in any manner that he wished to remain silent, nor did he state that he wanted an attorney present while talking with police. To the contrary, it could not be more clear that respondent clearly was eager to discuss the matter under investigation and was wholly willing to do so without any attorney

present. Respondent never having invoked his right to counsel, the only relevant inquiry is whether he voluntarily, knowingly, and intelligently waived the rights conveyed in the *Miranda* warnings. The record amply confirms the finding of the trial court that the waiver was validly made.

ARGUMENT AND AUTHORITIES

I. RESPONDENT NEVER INVOKED HIS RIGHT TO REMAIN SILENT OR TO HAVE COUNSEL PRESENT DURING DISCUSSIONS.

A. The plain sense of respondent's words conveys a waiver of the right to remain silent and the right to counsel.

Quite simply, respondent told police that he would not give them a written statement without an attorney present, but he had "no problem" in talking about the matter in question. Had the police proceeded to extract a written statement from respondent, there might be some serious question about whether such statement were admissible. No such written statement was ever obtained, however, and therefore no such question arises.

The record contains no indication, and the court below nowhere suggests, that respondent was laboring under the impression that oral statements were any less admissible in criminal proceedings than written statements. Indeed, prior to the first interview with the Wallingford police, respondent had been advised of his *Miranda* rights *on three separate occasions.* At least twice, he had acknowledged that he understood those rights and had signed a printed form setting them forth. Among the rights that were read to and acknowledged by respondent, of course, was the "right to *remain silent*" with the concomitant warning that "if you *talk* to any police officers, anything you *say* can and will be used against you in court." Also among those rights were the rights to consult with a lawyer and to "have him with you *during questioning,*" and the right to have a lawyer appointed for free "before any *questions.*" (emphasis added).

It could not be more clear, then, that respondent was advised of his rights to remain silent and to have a lawyer present during any discussions, and that respondent chose—and announced his choice in clear terms—to waive those rights.[1]

B. The refusal to sign a written statement without an attorney present does not constitute an invocation of the right to remain silent.

The essential question in this case is whether an invocation of the right to counsel for written but not oral statements must be construed by police as an omnibus invocation of the right to remain silent in any circumstance, even where a suspect spontaneously evinces a willingness to talk freely without an attorney. The great weight of authority answers that question with a resounding "no".

It is important to note at the outset that the court below skirted that question completely, and substituted tautology for analysis. That court cited, without quotation, *Fare v. Michael C.*, 442 U.S. 707, 719 (1979), for the proposition that "[t]he defendant's refusal to give a written statement without his attorney present was a clear request for the assistance of counsel to protect his rights in his dealings with the police." 197 Conn. at 57. We suppose that the court below was referring to that portion of the *Fare* opinion claiming that *Miranda v. Arizona*, 384 U.S. 436 (1966), created a "rigid rule

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1 In its opinion, the Connecticut Supreme Court stated that the trial court "impliedly found that the defendant had requested counsel." In a footnote that accompanies that statement, the Connecticut Supreme Court explained that "[t]he trial court noted the defendant's refusal to give a written statement without an attorney during its discussion of the defendant's waiver of his rights." 197 Conn. at 56, n.6. Hence, the "implied finding" of the trial court turns out to be nothing more than the trial court's acknowledgement that respondent refused to give a written statement without an attorney. In fact, the claim that respondent had invoked his right to counsel was first made only on appeal to the Connecticut Supreme Court.

that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogations cease." 442 U.S. at 719. The Connecticut Supreme Court's conclusion, though, scarcely follows from its premise. The fact that a request for an attorney is an invocation of one's Fifth Amendment rights does not mean that the statement that one will not make written statements without an attorney is a request for an attorney as respects oral discussions.

This Court made quite clear, in *North Carolina v. Butler*, 441 U.S. 369, 373 (1979), that the mere refusal to sign a written waiver of *Miranda* rights does not preclude a valid waiver of those rights:

> The question is not one of form, but of whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.

In *North Carolina v. Butler*, this Court endorsed a common sense approach to the waiver question that had theretofore been formulated and applied in a number of cases by a number of federal circuit courts of appeal.[2] As the District of Columbia Circuit noted in *United States v. Cooper*, 499 F.2d 1060 (D.C. Cir. 1974), it is

> a common experience of life that in many circumstances persons are willing to convey information orally but are reluctant to put the same

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2 See, e.g., *United States v. Cooper*, 499 F.2d 1060 (D.C. Cir. 1974); *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973) (*en banc*); *United States v. McNeil*, 433 F.2d 1109 (D.C. Cir. 1969); *Pettyjohn v. United States*, 419 F.2d 651 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970); *Harris v. Riddle*, 551 F.2d 936 (4th Cir.), *cert. denied*, 434 U.S. 849 (1977); *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *United States v. Stevens*, 445 F.2d 304 (6th Cir.) (per curiam), *cert. denied*, 404 U.S. 945 (1971); *United States v. Gardner*, 516 F.2d 334 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); *Klingler v. United States*, 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969).

> thing in writing. We do not think, as *Frazier en banc*, *McNeil*, and *Pettyjohn* have made clear before, that a refusal to sign a waiver means that the person interrogated is assuming a contradictory position with respect to his willingness to respond to oral questions, whatever may be his motive in so doing.

499 F.2d at 1062 (referring to the cases cited in footnote 2 hereof). The relevant inquiry, as *North Carolina v. Butler* and the circuit court cases make clear, is not the narrow one of whether the suspect has refused to sign a waiver or other statement, but rather the broad one of whether under the facts and circumstances presented the suspect has made a valid waiver.

Especially instructive is the *Frazier* case wherein a robbery suspect confessed to a series of other robberies in which he was not a suspect. When the officer listening to the confession reached for a pad and pencil to take notes, the suspect objected: "No, don't put anything down. Don't write anything." 476 F.2d at 893. The officer pushed the pad away, and the suspect continued with his confessions. When the suspect had finished relating what he wanted to tell, the officer suggested that the suspect sign a written version of what he had said. The suspect refused. 476 F.2d at 894. The panel that first heard the case concluded that the suspect's ban on notetaking was tantamount to invocation of the right to counsel, and that no statement, oral or written, made thereafter could be admissible absent an explanation to the suspect by police that the legal rules governing the admissibility of evidence do not distinguish between oral and written confessions. 476 F.2d at 898.

The circuit court sitting *en banc* disagreed. The United States Supreme Court, it said, took care in *Miranda* to spell out precisely the warnings to be given. It is not for a police officer to place a legal interpretation on those warnings; indeed, "[w]e doubt that the warmest friends of *Miranda* wish to see a return to the days when such officers, although not lawyers themselves, were free with legal advice to their prisoners." *Id.* at 898-99. The police had, said the *en banc* court, placed word for word

the warnings suggested by the *Miranda* court on their printed cards, and had read those warnings to the suspect. Those warnings "unmistakably gave notice that what one *says*, as distinct from what one *writes* or *signs*, can and will be used in court . . ." *Id.* at 896 (emphasis in original).

> When the police, as here, faithfully followed the exact procedure prescribed by the Supreme Court, inferior courts should be slow to mandate, after the fact, enlarged responsibilities alien to the duties and training of policemen.

476 F.2d at 899. Finding the other circumstances of the case to be entirely consistent with a valid waiver, the *Frazier en banc* court affirmed the admissibility of the officer's testimony.

While there are no federal cases on point, amicus respectfully submits that, provided a suspect is fully willing to give an oral statement without an attorney, it should not make a whit of difference whether the refusal to give a written statement is made without elaboration, or is softened and qualified by making exception for a circumstance in which an attorney is present.

Notwithstanding the absence of federal cases directly on point, there is a state case on point, decided, in fact, by the Connecticut Supreme Court: *State v. Harris*, 188 Conn. 574, 452 A.2d 634 (1982), *cert. denied*, 460 U.S. 1089 (1983). In that case, a suspect who had refused to sign a written waiver and had refused to make a written statement before consultation with a lawyer, sought to suppress his oral statements to police. The Connecticut Supreme Court, noting that the suspect had expressed to police a willingness to discuss the crime in question, and noting the absence of factors that have traditionally been held to cast doubt on a finding of a knowing and voluntary waiver, concluded that the suspect's oral statements were properly admissible. *State v. Harris, supra*, 452 A.2d at 637. See also *State v. Frazier*, 440 A.2d 916 (Conn. 1981), *cert. denied*, 458 U.S. 1112 (1982) (refusal to sign a written statement in the absence of an attorney did not vitiate an otherwise valid waiver of right to remain silent).

In sum, the holding of the court below is not in any way required by or consistent with any decision of this Court. To the contrary, the holding below is at odds with *North Carolina v. Butler*, *Edwards v. Arizona*, and with established and sensible precedent of a number of federal appeals courts.

C. Respondent's conduct and statements evidence a voluntary, knowing, and intelligent waiver of the right to remain silent and the right to counsel.

If any case presents an example of a knowing, voluntary, and intelligent waiver of the right to remain silent and the right to counsel, this case surely is it. Respondent was advised three times of his *Miranda* rights before the first discussions with police, and received an additional set of warnings before his second discussions. The trial court found that respondent "understood perfectly" those rights, and *respondent himself testified that he understood his rights.* Respondent's understanding is confirmed by his refusal to give a written statement without an attorney present and by the fact that he occasionally ignored questions from police during his narratives.[3] Respondent was not without example of a refusal even to talk to police without counsel present; co-assailant Artis, with whom respondent shared

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3 The Connecticut Supreme Court seemed to find something significant about the fact that Lieutenant Howard, who arrived at the police station after the first discussions among respondent and Officers Genovese and Cameron, was under the (mistaken) impression that respondent had called an attorney. Even if relevant, that fact can bear only on the second discussions. The lieutenant's mistaken impression is, however, not relevant. As this Court recently stated in *Moran v. Burbine*, 106 S. Ct. 1135, 1142 (1986), "the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." A closer case might be presented if respondent had announced that he had called his attorney, but since respondent did not announce that (because he had not done so), this matter not only is irrelevant but is not even a part of the case.

a cell at the Wallingford police station, exercised his right to remain silent.[4]

The nature of respondent's statements to police is, perhaps, the best evidence of voluntariness of his waivers of the right to remain silent and right to counsel.[5] The record makes clear

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4 This fact is noted on the police report prepared by Sergeant Genovese and admitted as State's Exhibit C for purposes of the suppression hearing. Tr. at 426.

5 Because we expect that respondent or amici filing briefs on respondent's behalf may make much of respondent's claimed injuries, we spell out in detail what those injuries consisted in. Upon arrival at the Wallingford police station, respondent had a cut—variously described as a "gash" (Tr. at 451) and a "scratch" (Tr. at 495)—on one of his hands, and attendant swelling. Respondent also had discoloration associated with bruising under his left eye. Tr. at 489. In Lieutenant Howard's view, respondent's hand was doubtlessly sore, but no pain or serious discomfort on respondent's part was evident. Tr. at 509. The decision to transport respondent to a hospital emergency room was made because of the police's concern about a leg injury to co-assailant Artis, who requested hospitalization. Tr. at 471. Respondent testified that he also had requested medical attention. (Tr. at 865, 868); Lieutenant Howard recalled no such request, and testified that any request would have been honored (Tr. at 506, 509-10). At the hospital, respondent was given a prescription for eye drops. There is no evidence at all in the record that his hand required any medical treatment. Lest the implication arise that the injuries of respondent and Artis may have been caused by police, we note that the record clearly indicates that respondent's hand injury may have been caused by the efforts of the victim to resist efforts to undress her (Tr. at 14, 736), and that the other injuries of respondent and assailant resulted from a barroom brawl in which the angered brothers of the victim attacked her assailants (Tr. at 244, 261, 478, 492-93, 652-53, 713, 728-29, 843-47). Ironically, by arresting the assailants, police plucked them from a potentially lethal brawl (Tr. at 845) and transported them to one of the few places where they could be certain of being safe that evening—the police station.

that the statements were not extracted by lengthy questioning, or insistent badgering, or physical force, or psychological coercion.[6] Rather, those statements were spontaneous narratives by a speaker who was both willing and eager to tell his side of the story, and who in so telling that story sometimes chose to ignore the questions occasionally interjected by his interlocutors.

Manifestly absent from this case are the "salient features" of "incommunicado interrogation of individuals in a police-dominated atmosphere" without "full warnings of constitutional rights" that were "essential" to the decisions in *Miranda*, 384 U.S. at 445. Respondent's phone calls and discussions with the co-assailant (who refused to talk with police)[7] are obvious forms of communication that make respondent's first hours in custody the opposite of "incommunicado". In sum, not only respondent's words, but also his acts and the circumstances surrounding them evince a voluntary, knowing, and intelligent waiver of his right to remain silent and right to counsel, and fully support the ruling of the trial court, which observed firsthand the witnesses to the events in question, that the waiver was validly made.

II. *EDWARDS V. ARIZONA* AND ITS PROGENY ARE CONSPICUOUS EXAMPLES OF POLICE BADGERING IN THE FACE OF AN ACCUSED'S CLEAR REQUEST FOR COUNSEL, AND THESE CONDITIONS ARE ABSENT IN THIS CASE.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the defendant unequivocally requested an attorney during the first interroga-

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6 Tr. at 454, 491, 600-03.

7 It is clear from the record that respondent and Artis conversed while at the Wallingford police station, if not before the first discussions, certainly before the second. Tr. at 865.

tion, whereupon questioning ceased and he was removed to a jail cell. The next morning, he was told that he "had to" talk to detectives, even though he had stated quite clearly that "he did not want to talk to anyone." 451 U.S. at 479. Thus, *Edwards* presents a clear example of impermissible badgering of a suspect who in clear and unmistakable terms expressed his desire to exercise his Fifth Amendment right against self-incrimination.

As the states of Alaska et al. demonstrate in their amicus brief urging reversal in this case, the focus upon the presence or absence of badgering or coercion by police is a thread that runs through cases decided since *Edwards*, including *Smith v. Illinois*, 105 S. Ct. 490 (1984); *Solem v. Stumes*, 465 U.S. 638 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); and *Wyrick v. Fields*, 459 U.S. 42 (1982). This common theme strikes much closer to the heart of the voluntariness inquiry that has historically been the central concern of Fifth Amendment analysis than does the holding below. There was simply no badgering or overriding of the suspect's decision to remain silent.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Connecticut Supreme Court.

Respectfully submitted,

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